

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 72

JOHN M. LEHMANN, OFFICER IN CHARGE,
IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

vs.

UNITED STATES OF AMERICA, EX. REL. BRUNO
CARSON OR BRUNO CARASANITI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1956

CERTIORARI GRANTED NOVEMBER 10, 1956

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INDEX

	Original	Print
Record from U.S.D.C. for the Northern District of Ohio, Eastern Division	1	1
Appendix to brief of appellant	1	1
Docket entries	1	1
Application for writ of habeas corpus	3	2
Return to writ of habeas corpus and answer to peti- tion for writ	5	5
Excerpt from transcript of proceedings on application for writ of habeas corpus	9	8
Opinion, McNamee, J.	11	13
Order denying application for writ of habeas corpus	12	11
Proceedings before the Board of Immigration Appeals	13	11
Warrant of deportation	13	11
Opinion of Board of Immigration Appeals	15	12
Warrant for arrest of alien	22	20
Pardon	24	22
Proceedings in U.S.C.A. for the Sixth Circuit	26	23
Argument and submission (omitted in printing)	26	
Judgment	26	23
Opinion, Stewart, J.	27	23
Petition for rehearing (omitted in printing)	35	
Order denying rehearing	42	32
Stipulation for substitution of party-appellee	42	32
Clerk's certificate (omitted in printing)	43	
Order allowing certiorari	44	32

Appendix to Brief of Appellant—Filed April 5, 1955

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF
OHIO, EASTERN DIVISION

No. 30,800

UNITED STATES OF AMERICA, EX REL., BRUNO CARSON OR BRUNO
CARASANITI, PLAINTIFF,

J. S. KERSHNER, ACTING OFFICER IN CHARGE, DEFENDANT

DOCKET ENTRIES

- 1/22/54. Application for writ of habeas corpus filed.
- 1/22/54. Order granting alternative writ of habeas corpus returnable February 1, 1954 filed. McNamee, J. Noted 1/22/54.
- 1/22/54. Writ of Habeas Corpus issued. 2 Copies of application and Order to U. S. Marshal.
- 1/22/54. Writ of Habeas Corpus retn. & filed. Served 1/22/54. Fees \$2.00.
- 1/25/54. Bond fixed in the amount of \$10,000.00. McNamee, J.
- 1/25/54. Bond filed. (Summit Fidelity & Surety Co.)
- 1/27/54. Return to Writ of Habeas Corpus and answer to petition for writ filed. Copy mailed January 27, 1954.
- 2/2/54. Memorandum of Respondent filed. Copy mailed 2/2/54.
- 2/9/54. Answer to return on writ of habeas corpus by plaintiff filed. Copy acknowledged 2/9/54.
- 2/9/54. Brief in behalf of relator filed. Copy acknowledged 2/9/54.
- 2/9/54. Oral hearing on application for Writ of Habeas Corpus begun and concluded; counsel of relator to file amended brief within 10 days, taken under advisement, McNamee, J. - Reporter Kitchen.
- 2/9/54. Defendant's exhibit A received and filed. (file)
- 2/19/54. Supplemental brief of relator filed. Copy mailed 2/19/54.
- 3/31/54. Supplemental Memorandum of Respondent filed. Copy mailed 3/31/54.

DOCKET ENTRIES

4/16/54. Supplemental memorandum of respondent filed. Copy mailed 4/16/54.

4/26/54. Memorandum Opinion filed, McNamee, J. (Writ denied). Copies to counsel.

4/27/54. Order that the application for a writ of habeas corpus is hereby denied filed, McNamee, J. Noted 4/27/54. Copies to counsel.

5/3/54. Application setting \$10,000 bail pending appeal filed, McNamee, J. Copy served 5/3/54.

5/3/54. Bond pending appeal filed. (Summit Fidelity & Surety Co.)

5/7/54. Motion of Relator for new trial filed. Copy served 5/7/54.

6/24/54. Endorsed ruling overruling motion for new trial, McNamee, J. Copies to counsel.

6/28/54. Order that the relator's motion for a new trial is overruled, McNamee, J. Copies to counsel.

7/23/54. Notice of Appeal by Plaintiff filed. Copy mailed by Clerk to attorney for defendant 7/23/54.

8/13/54. Stipulation & Order extending time for filing record on appeal in U. S. Court of Appeals to and including October 20, 1954, filed, McNamee, J. Noted 8/13/54. Notice waived.

9/29/54. Transcript of proceedings taken 2/9/54 filed.

10/13/54. All of original papers and pleadings of record on appeal mailed to Clerk, U. S. Court of Appeals, Cincinnati, O. (Receipt ack'n. 10/20/54).

IN UNITED STATES DISTRICT COURT

APPLICATION FOR WRIT OF HABEAS CORPUS—Filed January 22, 1954

Now comes Bruno Carson, a. k. a. Bruno Carasaniti, and, in support of his application for Writ of Habeas Corpus, says as follows:

1. That he is now in custody of the Immigration and Naturalization authorities of Cleveland, and is held by them in the County Jail at Cleveland, Ohio.

2. Petitioner is an alien, against whom deportation proceedings have been pending under the Act of February 5th, 1917, and under the Immigration and Nationality Act: Convicted after entry of two crimes involving moral turpitude, blackmail.

3. Petitioner was arrested on January 19th, 1954, without notice and for no reason while he was out on bail, duly posted and accepted by the Department since March, 1953.

4. The petitioner's appeal from an order of the Hearing Examiner, dated August 31st, was dismissed by the Board of Immigration Appeals on January 19th, 1954.

5. That the hearing conducted by the Hearing Examiner upon which the order of deportation is based, was biased, prejudicial and unfair, and that the order of deportation was an act of arbitrariness and capriciousness.

6. Petitioner alleges that said hearing was illegal and unconstitutional.

7. That although the charges were based on the law of 1917, particularly the stowaway charge, which carried a statute of limitation of 5 years, and in this case, the right of prosecution for that charge terminated in 1924, both the Hearing Examiner and the Board of Appeals ignored the existence of that law, and arbitrarily found that the petitioner rather comes under the law of 1952—The McCarran Act—although he became a stowaway in 1919.

8. With reference to the criminal charge, it is called to the Court's attention, that in 1945 this very charge was contained in a deportation case that was then pending against this petitioner. That Governor Lausche of Ohio then granted a pardon for one of the crimes alleged in the deportation warrant. The Immigration Service accepted that pardon, and terminated the proceedings against this petitioner, and cancelled the Warrant of Deportation then outstanding.

9. The Hearing Examiner now holds that although the Department did accept said pardon by the governor, and terminated the deportation proceedings on October 9th, 1945, because "This pardon was deemed sufficient to meet the provisions contained * * * in the law of 1917 * * *," he now holds that the law of 1952 "supersedes" the law of 1917, and that the new law required a full and unconditional pardon, whereas the old law merely required a

pardon, and that such pardon was acceptable, even though it might have been conditional.

10. Hearing Examiner arbitrarily overruled counsel's objection to the manner of the hearing, because same was conducted by the Hearing Examiner, who was an employee of the Immigration Service. Also, that the repeal by Congress of Sections 1004, 1006 and 1007 of Administrative Procedure Act, affecting only the Immigration Service, was unconstitutional, and constituted a discrimination.

11. That there is nothing in the law of 1952 (McCarran Act) that provides for the cancellation of prior laws, and it is the contention of this petitioner, that the McCarran Act is effective as of December 24th, 1952, and not at any time before that date.

12. That at the hearing before the Board of Appeals, the Board arbitrarily refused to entertain a request for discretionary relief, although counsel made such request.

13. That the hearing was unfair; the action of the Attorney General, in issuing the warrant of arrest and or deportation, was arbitrary and capricious; is therefore contrary to law, and in violation of the Constitution of the United States.

WHEREFORE your petitioner prays that a Writ of Habeas Corpus issue forthwith, directed to said J. S. Kershner, or his deputies, commanding him to have the body of Bruno Carson or Bruno Carasanti, together with the cause of such detention, restraint and imprisonment, forthwith before this Court, and that upon hearing of the cause, the Relator be discharged from further custody of the Respondent, or for such other or further relief to which he may be entitled in law or in justice.

Henry C. Lavine, Attorney for Relator.

IN UNITED STATES DISTRICT COURT

RETURN TO WRIT OF HABEAS CORPUS AND ANSWER TO PETITION
FOR WRIT—Filed February 9, 1954

Now comes the above named respondent and for a return to the writ of habeas corpus issued by the above entitled court and for answer to the petition for said writ states:

1. The respondent is the Acting Officer in Charge of the Cleveland Office of the Immigration and Naturalization Service, United States Department of Justice.

2. The relator is an alien, a native and citizen of Italy, fifty-two years of age.

3. The relator entered the United States at the port of New York on or about September 4th or 5th, 1919, as a stowaway on the SS "La France"; that he has never been lawfully admitted to the United States for permanent residence nor has his immigration status ever been adjusted to that of a legally resident alien.

4. On January 15, 1936 the relator was convicted in the Common Pleas Court, Cuyahoga County, Ohio of the crime of Blackmail, committed on or about December 11, 1935 and was sentenced to imprisonment in the Ohio State Penitentiary for an indeterminate period and to pay the costs of prosecution.

5. The relator was again convicted on April 25, 1936 in the Court of Common Pleas, Lorain County, Ohio of the crime of Blackmail, committed on or about October 15, 1935 and was sentenced to imprisonment in the Ohio State Penitentiary and to pay the costs of prosecution, said sentence to begin at the expiration of the sentence which he was then serving.

6. The relator was released from imprisonment on or about February 1, 1941.

7. The Governor of the State of Ohio granted the relator a pardon dated July 30, 1945 for the crime of Blackmail for which the relator was convicted in Lorain County, Ohio on April 25, 1936; that said pardon states it was granted "From this time forward, conditioned upon good behavior and conduct and provided that he demean himself as a law-abiding person and is not convicted of any other crime, otherwise this pardon to become null and void."

8. A warrant of arrest in deportation proceedings was issued against the relator on June 23, 1953 on the following charges: Sec. 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to-wit, a stowaway, under Sec. 3 of the Act of Feb. 5, 1917, and, Sec. 241(a)(4) of the Immigration and Nationality Act, in that, he at any time after entry, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to-wit, blackmail and blackmail.

9. The said warrant of arrest was served upon the relator at Cleveland, Ohio on June 24, 1953.

10. The relator was thereafter released from custody on or about the 17th day of July, 1953 under bond in the sum of \$10,000.00.

11. The relator was accorded a hearing under the warrant of arrest in deportation proceedings at Cleveland, Ohio on July 17, 1953 before a Special Inquiry Officer of the Immigration and Naturalization Service.

12. By memorandum dated August 31, 1953, the Special Inquiry Officer ordered the relator to be deported in the manner provided by law on the charges contained in the warrant of arrest.

13. The relator appealed to the Board of Immigration Appeals, Department of Justice from the order of the Special Inquiry Officer.

14. The Board of Immigration Appeals by decision dated January 19, 1954 affirmed the order of deportation of the Special Inquiry Officer and dismissed the appeal.

15. A warrant of deportation dated January 19, 1954 was issued directing the deportation of the relator on the charges contained in the warrant of arrest and in the order of deportation.

16. The relator was taken into custody under the outstanding order of deportation on January 19, 1954.

17. Prior to the time the relator was taken into custody, the Immigration and Naturalization Service had received reliable confidential information indicating that relator intended to abscond as soon as he received definite information that the Board of Immigration Appeals had entered a decision adverse to him.

18. At no time during the course of the administrative proceeding did relator or his counsel interpose any objection to the legality or constitutionality of the hearing and no objection was interposed to the manner in which the hearing under the warrant of arrest was conducted.

19. The relator has been accorded a full and fair hearing under the warrant of arrest in deportation proceedings and the order and warrant of deportation are based upon substantial evidence clearly establishing deportability on the grounds heretofore stated.

20. The relator was taken into custody for the purpose of deportation; that arrangements for the deportation of the relator have been completed.

21. The relator is detained in accordance with the Immigration Laws of the United States and the regulations made pursuant thereto.

22. That at the hearing on the petition for a writ of habeas corpus, the respondent will produce the records of the Immigration and Naturalization Service relating to the relator; that said records are made a part of this return and incorporated herein as if fully set forth herein.

WHEREFORE, it is respectfully urged that the writ of habeas corpus herein be dismissed and the relator remanded to the custody of the Immigration and Naturalization Service.

J. S. Kershner, Acting Officer in charge Immigration and Naturalization Service, Cleveland, Ohio. John J. Kane, Jr., United States Attorney, Robert C. Grisanti, Asst. United States Attorney.

(Verification omitted.)

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS

had on application for writ of habeas corpus taken before Hon. Charles J. McNamee, Judge of said court, on Tuesday, the 9th day of February, 1954.

APPEARANCES:

On behalf of the Relator: Henry C. Lavine, Esq.

On behalf of the Respondent: Robert C. Grisanti, Assistant U. S. Attorney, and Herman I. Branse, Esq.

(2) (Thereupon arguments had by the respective counsel.)

STIPULATIONS

Mr. Lavine: Your Honor, I believe Government counsel would agree with the Court's permission to stipulate that this warrant of arrest that was issued last summer, I believe in June, against Bruno Carasanti was not based on any conviction of crime to the knowledge of the department which would void this pardon. It was not based on any conviction of any new crime.

The Court: Of any crime subsequent to the crime for which he was sentenced.

Mr. Lavine: And it was also stipulated that as stated by the Board of Immigration Appeals that the fact as stated on page 2 pertaining to the acceptance by the Board of the pardon which was given to Bruno by Governor Lausche was accepted by the Board and that the proceedings then were dropped.

The Court: Page 2 of what?

Mr. Lavine: Page 2 of the Board of Immigration Appeals opinion.

The Court: Do you have that here as part of the immigration record?

(3) Mr. Grisanti: Yes, your Honor.

The Court: Stipulated that the pardon was accepted as being a pardon defined by the Act then in effect?

10 Mr. Lavine: That's right.

The Court: All right. What else?

Mr. Lavine: Those are the two I believe we agreed on.

Mr. Grisanti: That is all. We so stipulate.

The Court: Then I take it, Mr. Lavine, there is no other evidence upon which the Relator desires to adduce proof?

Mr. Lavine: Well, we would have liked the opportunity to present testimony, but there is no other conflict in the evidence as—

The Court: Well, I want the record to be clear on this. You have not been denied any opportunity to present any evidence at all that may be relevant to the issues raised by the application for this writ.

Mr. Lavine: Well, the only other evidence I wanted to present to the Court was the testimony of the Relator as to the kind—as to what he has been doing and to his life here and (4) what the situation was pertaining to his present status.

The Court: Well, is there anything in the record that indicates anything to the contrary?

Mr. Lavine: Well, there was an allegation in the return by the Government that, as I said before, he was ready to pull up stakes.

The Court: Well, that relates only to his possible flight.

Mr. Lavine: Yes.

The Court: Well, that has nothing to do with this. But is there anything in the record of the hearing before the immigration authorities or the Immigration Board of Appeals that tends to show that he has acted in such a manner as to warrant the action being taken or that he has acted otherwise than as a good law abiding citizen?

Mr. Lavine: Outside of that allegation, no, there is nothing else.

The Court: Is there anything else that you desire to submit proof on?

Mr. Lavine: I don't think so at this time, your Honor.

The Court: May the record show that (5) there is nothing in addition to the stipulations upon which the Relator desires to submit proof?

Mr. Lavine: Yes, your Honor. I do want additional time.

The Court: Yes. How much time do you want?

Mr. Lavine: I should have a week or ten days.

The Court: All right. If the Government wants to reply after receiving it—do you wish to reply to the brief that Mr.

Lavine has filed? Suppose you defer doing that until I receive the additional brief. I haven't read this one yet and then you may file a reply to both this brief and the additional brief filed by Mr. Lavine.

The court will suspend until 2:00 o'clock.

(Thereupon court adjourned) —

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed April 26, 1954

McNAMEE, *District Judge.*

A warrant of arrest in deportation proceedings was issued against the relator on June 23, 1953 on the following charges: Sec. 241(a)(1) of the Immigration and Nationality Act, in that at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to-wit, a stowaway, under Sec. 3 of the Act of Feb. 5, 1917, and Sec. 241(a)(4) of the Immigration and Nationality Act, in that, he at any time after entry, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to-wit, blackmail and blackmail.

The said warrant of arrest was served upon the relator at Cleveland, Ohio on June 24, 1953, and he was accorded a hearing in deportation proceedings at Cleveland, Ohio on July 17, 1953 before a Special Inquiry Officer of the Immigration and Naturalization Service.

By memorandum dated August 31, 1953, the Special Inquiry Officer ordered the relator to be deported in the manner provided by law on the charges contained in the warrant of arrest.

The relator appealed to the Board of Immigration Appeals, Department of Justice, from the order of the Special Inquiry Officer.

The Board of Immigration Appeals by decision dated January 19, 1954, affirmed the order of deportation of the Special Inquiry Officer and dismissed the appeal.

The essential facts are not in dispute and are correctly set forth in the memorandum opinion of the Board of Im-

migration Appeals. I am also persuaded that the reasons stated and the authorities cited in the memorandum of the Board are decisive against the relator's claim for relief.

Therefore, upon the facts and for the reasons stated in the opinion of the Board of Immigration Appeals the writ is denied.

IN THE UNITED STATES DISTRICT COURT

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

Filed April 27, 1954

Upon consideration it is ordered that the Application for Writ of Habeas Corpus is hereby denied.

Charles J. McNamee, United States District Judge.

13-14 BEFORE THE BOARD OF IMMIGRATION APPEALS

United States of America
Department of Justice
Immigration and Naturalization Service

No. E-076976

WARRANT OF DEPORTATION

To: Acting Chief, Border Patrol, Detention and Deportation Division, Buffalo, N. Y.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

WHEREAS, after due hearing before an authorized Special Inquiry officer of the United States Immigration and Naturalization Service, and upon the basis thereof, an order has been duly made that the alien BRUNO DOMINICO CORASANTI alias BRUNO CARSON who entered the United States at New York, N. Y. on or about the 4th day of September, 1919, is subject to deportation under the following provisions of the laws of the United States, to wit: Sec. 241(a)(1) of the Immigration and Nationality Act, in that, at time of

entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, a stowaway, under sec. 3 of the Act of Feb. 5, 1917; and Sec. 241(a)(4) of the Immigration and Nationality Act, in that, he at any time after entry, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, Blackmail and Blackmail.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to take into custody and deport the said alien pursuant to law, at the expense of the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1954" including the expenses of an attendant, if necessary.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 19th day of January, 1954.
At Buffalo, New York.

A. J. Karnuth, District Director, Buffalo District.

15

BEFORE THE BOARD OF IMMIGRATION APPEALS

U. S. Department of Justice
Board of Immigration Appeals

DECISION—January 19, 1954

File: E-076976—Buffalo.

In re: BRUNO DOMINICO CORASANITI alias BRUNO CARSON.
In Deportation Proceedings.

In Behalf of Respondent: Henry C. Lavine, Esquire,
1410 Williamson Building, Cleveland, Ohio (Heard: December 1, 1953), Sidney B. Rawitz, Service Representative
before the Board (Also heard).

Charges:

Warrant: Immigration and Nationality Act—Excludable by law existing at time of entry, to wit: A stowaway, under Section 3 of the Act of February 5, 1917.

Immigration and Nationality Act—Convicted after entry of two crimes involving moral turpitude, to wit: Blackmail, and blackmail.

Lodged: None.

Application: Termination of proceedings or remand for character investigation.

Detention Status: Released on bond in the sum of \$10,000.00.

This is an appeal from an order of the special inquiry officer dated August 31, 1953 directing the respondent's deportation.

The respondent is a 52-year-old married male, a native and citizen of Italy; who testified that his only entry into the United States occurred at the port of New York about September 4 or 5, 1919 as a stowaway on the SS LA FRANCE. He admitted that at the time of his entry he was not inspected by an immigrant inspector. On January 15,

16 1936 he was convicted in the Common Pleas Court,

Cuyahoga County, Ohio of the crime of blackmail committed on or about December 11, 1935, and was sentenced to imprisonment in the Ohio State Penitentiary for an indeterminate period and to pay the costs of prosecution.

On April 25, 1936 he was again convicted in the Court of Common Pleas, Lorain County, Ohio of the crime of blackmail committed on or about October 15, 1935 and was again sentenced to imprisonment in the Ohio State Penitentiary and to pay the costs of prosecution, said sentence to begin at the expiration of the sentence which he was then serving.

The respondent testified that he was sentenced to imprisonment for one to five years for each of said crimes and that he was released from imprisonment on February 1, 1941.

The record contains a pardon dated July 30, 1945 signed by the Governor of Ohio granting a pardon for the crime of blackmail for which the respondent was convicted in Lorain County, Ohio in April 1936. The pardon states that it was granted to the respondent, "from this time forward, conditioned upon good behavior and conduct and provided that he demeans himself as a law-abiding person and is not convicted of any other crime, otherwise this pardon to become null and void."

It appears that deportation proceedings previously were instituted against the alien, predicated on the same two crimes which furnish the basis of the instant proceedings.

By order of this Board dated October 9, 1945, the outstanding order of deportation previously entered on February 26, 1937 was withdrawn and the proceedings terminated upon the respondent's submission of the pardon referred to. The special inquiry officer has nevertheless found the respondent deportable in these proceedings under the Immigration and Nationality Act on the warrant charges and has ordered his deportatoin. Counsel has raised a number of objections to this order, which we shall now consider.

At the outset of the hearing, counsel urged that the hearing was illegal because it did not conform to the requirements of Sections 5, 7 and 8 of the Administrative Procedure Act, and failed to comply with the requirements of due process of law. We have previously considered and rejected that argument. *Matter of M-*, A-2669541, BIA, June 1, 1953, Int. Dec. 442. Since the hearing in the instant case was conducted in accordance with Section 242(b) of the Immigration and Nationality Act which constitutes the sole and exclusive procedure for conducting deportation proceedings, it meets the requirements of due process. *U.S. ex rel Marcello v. Ahrens*, 113 Fed. Supp. 22 (D.C., La.—1953). See also *Barber v. Yanish*, 196 F(2d) 53 (CA-9), cert. denied 344 U.S. 817. We therefore consider counsel's objection to the hearing procedure to be without merit.

Counsel further contends that since the respondent was not deportable under the Immigration Act of February 5, 1917, as amended, the proceedings under the Immigration and Nationality Act were illegal since as applied to the respondent, they were conducted under a law which
 17 constitutes ex post facto and retroactive legislation and is therefore unconstitutional. This argument involves a consideration of the position of the respondent under the respective Acts in question.

The respondnt was not amenable to deportation on the stowaway charge under the Act of 1917, as amended, because the prior proceedings were not instituted within five years after entry, as expressly required by Section 19(a) of that Act. He was not deportable under the 1917 Act on the criminal charge because in accordance with the prevailing administrative interpretation, the pardon which he had received was construed as meeting the requirements of Section 19(a) of said Act pertaining to pardoned aliens.

The Court traced the origin and development in our immigration and naturalization statutes of this savings provision. 348 U. S. 528, at 531-535. It was the Court's conclusion that "The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." 348 U. S. at 535.

In the *Shomberg* case the Court held that the savings provisions of section 405 of the Act did not preserve the alien's previously acquired status from the operation of section 318 of the Act. The Court found that the relevant savings clause in that case was the one contained in section 405(b). That section, like section 405(a), consists of a general savings provision which applies unless "otherwise specifically provided." Since section 318 expressly states that its provisions shall be applicable "notwithstanding the provisions of section 405(b) of this Act," the Court concluded that here was an instance where the Act had "otherwise specifically provided" and where the savings clause therefore was superseded. In passing, the Court pointed out four other places in the 1952 Act where Congress had "clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of the savings clause." 348 U. S. at 547; see footnote 5. In each instance cited the statute expressly states that a given provision shall apply "notwithstanding" the provisions of the savings clause.³

The *Menasche* and the *Shomberg* opinions thus clearly teach that the savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. It was held in the *Shomberg* case that such intent is clear where it is specifically provided that a provision shall be

³ See also *United States v. Stromberg*, . . . F. (2d) . . . (5 Cir., November 15, 1955).

(Here follows 1 Photolithograph, side folios 24-25)

However, the provisions of the Immigration and Nationality Act under which the instant proceedings were brought are different from those of the Act of 1917, as amended. Section 241(a)(1) of the Immigration and Nationality Act provides for the deportation of any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry". Stowaways were among the classes excludable at entry under Section 3 of the Act of February 5, 1917, as amended. The fact that respondent entered the United States as a stowaway in 1919 is immaterial, for Section 241(d) of the Immigration and Nationality Act expressly states:

Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all the aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

In view of this language, and the fact that there is no provision for a statute of limitations with respect to any deportation charge contained in the Immigration and Nationality Act, it is apparent that the respondent now falls within the purview of Section 241(a)(1) of said Act.

With respect to the criminal charge, reference to the statute will indicate that here, too, a change has been effected. Section 241(a)(4) of the Immigration and Nationality Act renders deportable any alien "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial". Section 241(d) of the Immigration and Nationality Act, previously referred to, makes this section applicable regardless of when the conviction occurred. Its language is sufficiently broad to include not only new classes of deportable aliens, but also to eliminate preexisting bars

18 to deportation. *U.S. ex rel Marcello v. Ahrens*, 113 F. Supp. 22 (D.C. La., 1953); *U.S. ex rel Barile v.*

32 effective "notwithstanding" the terms of the savings clause. No such clear manifestation of intent is apparent in the present case.

We conclude that Carson's status of nondeportability is protected by section 405 of the Act, since the statutory provisions upon which appellee relies do not constitute such specific exceptions to section 405 as are contemplated in that section in order to make it inapplicable. In reaching this conclusion we have been aided by the reasoning of a recent decision directly in point by Judge McNamee of the Northern District of Ohio, in *United States ex rel. Dominic Sciria v. John H. Lehmann*, decided October 7, 1955. In a characteristically clear and thorough opinion, Judge McNamee concluded that section 405(a) of the Act operated to protect the status of an alien entering as a stowaway in 1922 who had acquired immunity to deportation by the passage of time under the 1917 Act. It was Judge McNamee who denied the writ of habeas corpus in the present case. In the *Sciria* opinion he expressly stated his conclusion that he had been in error in the present case, pointing out that the savings clause had not been relied upon by Carson in the hearing before him. While Judge McNamee refrained from commenting upon the other ground for deportation relied upon in the present case, i.e., the fact that the pardon Carson received was not an unconditional one, the reasoning of his opinion in the *Sciria* case would also clearly lead to the conclusion we have reached that Carson's status of nondeportability on this ground is likewise preserved by section 405(a) of the Act.

Other federal courts have uniformly given a broad interpretation to section 405 in varying factual situations. See *United States ex rel. De Luca v. O'Rourke*, 213 F. (2d) 759 (8 Cir., 1954); *Yanish v. Barbér*, 211 F. (2d) 467 (9 Cir., 1954); ⁴ *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N. D.

⁴ "It would appear from the language of this reservation that Congress, as a measure of policy or precaution, intended to preserve the effectiveness of all subsisting proceedings, orders, or judgments fixing or determining individual statuses, obligations, liabilities, or rights; and for this purpose to have continued in force the statutes or parts thereof under which such status, obligation, liability or right became fixed or determined." 211 F. (2d), at p. 470.



FRANK J. LAUSCHE

Governor of said State

(In all to whom these Presents shall come, Greeting:)

Whereas, at the April term of the Court of Common Pleas held in and for the County of Lorain, in the

Whereas, at the April term of the Court of Common Pleas held in and for the County of Lorain, in the year of our Lord One Thousand Nine Hundred and thirty-six

Bruno Corasaniti was convicted of the crime of Blackmail and sentenced by said Court to imprisonment in the Ohio Penitentiary for a term of 1 to 5 years and

Whereas, the Pardon of said Bruno Corasaniti has been recommended by Ohio Pardon and Parole Commission

Therefore, by virtue of the authority vested in the Governor by the Constitution and Statutes of the State, I do hereby grant to the said

Bruno Corasaniti a Pardon, ~~from~~ ^{from} this time forward, conditioned upon good behavior and conduct and provided that he demeans himself as a law abiding person and is not convicted of any other crime, otherwise this Pardon to become null and void.



In Testimony Whereof, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed, at Columbus, this 30th day of July, in the year of our Lord, one thousand nine hundred and forty-five.

Whereas, the Pardon of said Bruno Corasaniti has been recommended by Ohio Pardon and Parole Commission

Therefore, by virtue of the authority vested in the Governor by the Constitution and Statutes of the State, I do hereby grant to the said

Bruno Corasaniti a Pardon, ~~from~~ ^{from} this time forward, conditioned upon good behavior and conduct and provided that he demeans himself as a law abiding person and is not convicted of any other crime, otherwise this Pardon to become null and void.



In Testimony Whereof, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed, at Columbus, this 30th day of July, in the year of our Lord, one thousand nine hundred and forty-five.

Frank J. Lausche

the Governor: Edward J. Hummel
Secretary of State.

Murff, (D.C. Maryland, November 10, 1953). Since moral depravity inheres in the crime of blackmail that crime involves moral turpitude. *Libarian v. State Bar*, 239 P(2) 865 (Cal. 1952). Unless, therefore, the respondent can claim the benefit of the pardon received in 1945, he falls within the scope of Section 241(a)(4).

Since a pardon is an act of grace and mercy, inherent in the pardoning power is the right to make the pardon absolute or conditional. *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833). A conditional pardon is one to which a condition is annexed, the performance of which is necessary to the validity of the pardon. *Fehl v. Martin*, 155 Oregon 455, 64 P. (2d) 631 (1937). Conditional pardons may be those involving conditions precedent or conditions subsequent. If there is a condition precedent, such condition must be performed before the pardon can take effect. If the pardon contains a condition subsequent, such condition, if violated, causes the pardon to become null and void. *State ex rel Gordon v. Zangerle*, 136 Ohio State 371, 26 N.E. (2) 190 (1940); *The Attorney General's Survey of Release Procedures*, Vol. 3, P. 205 (1939). On the revocation of a pardon for a breach of one of its conditions, the legal status of the person pardoned must be regarded as being the same as it was before the pardon was granted. *State ex rel Gordon v. Zangerle*, (supra).

It has been held that pardons granted by the Governor of Ohio¹ containing conditions similar to that in the instant case were valid pardons under the Act of 1917, as amended, on the ground that such pardons, having been granted on conditions subsequent which might never occur, should be regarded as removing the ground of deportability resulting from the crimes. See *Matter of B—*, A-5224813 and *Matter of B—*, 56083/976 (B.I.A. 1946), referred to in *Matter of B—*, A-5829477, 3 I.&N. Dec. 551 at pp. 553 and 554.

¹ Article 3, Section 11 of the Constitution of Ohio adopted in 1851 provides that the governor "shall have power, after conviction, to grant reprieves, commutations and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by the law.

26 IN THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

ARGUMENT AND SUBMISSION—October 19, 1955

(omitted in printing)

IN UNITED STATES COURT OF APPEALS

JUDGMENT—Filed December 17, 1955

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded to the District Court for further proceedings consistent with the views expressed in the opinion herein.

[fol. 27] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12361

UNITED STATES OF AMERICA, ex rel. BRUNO CARSON or BRUNO
CARASANITI, *Appellant*,

v.

J. S. KERSHNER, Officer in Charge, *Appellee*

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

OPINION—Decided December 17, 1955

Before MARTIN, MILLER and STEWART, Circuit Judges

STEWART, Circuit Judge. A warrant of arrest in deportation proceedings was issued against the relator, Bruno Carson, in June of 1953. After a hearing before a Special

When the previous deportation proceedings against the respondent were terminated on October 9, 1945, that action was taken because Section 19(a) of the Act of 1917, as amended, imposed no restriction on the type of pardon that would be sufficient to render an alien immune to deportation. Section 241(b) of the Immigration and Nationality Act, on the other hand, provides as follows:

The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a *full and unconditional* pardon by the President of the United States or by the Governor of any of the several states
* * * (Underscoring supplied):

19 . We interpret this section as constituting a change in the existing law. In construing a statute, Congress is presumed to mean what it says and in the absence of any ambiguity in the statute, it is to be construed according to its plain terms. *United States Lines v. Shaughnessy*, 101 F. Supp. 61, aff'd 195 F. (2d) 385 (C.A. (2d), 1952)). It is also presumed that Congress was aware of the existing statutes, as well as the interpretations thereof; and that a change in the statutory language was intended to achieve a change in legislative result. *Sutherland, Statutes and Statutory Construction*, Volume 2, Section 450 (1943 Edition). In restricting the benefits of Section 241(b) to aliens who have obtained full and unconditional pardons, Congress has unequivocally removed from the benefits of that section any pardon which does not meet those requirements. Whether a pardon contains a condition precedent or condition subsequent is no longer material. So long as the pardon is conditional, it does not come within the provisions of the section. It is our conclusion, therefore, that a conditional pardon such as that obtained by the respondent is ineffective to prevent deportation under Section 241(a)(4) of the Immigration and Nationality Act.

Having determined that the respondent falls within the scope of Sections 241(a)(1) and 241(a)(4) of the Immigration and Nationality Act, we now turn to counsel's argument that an attempt to apply those sections to the respondent would be unconstitutional because he has obtained

vested rights under the Act of 1917, as amended. We find this argument to be without merit. It is well settled that a prior administrative determination is not *res judicata* in the technical sense. *Pearson v. Williams*, 202 U.S. 281 (1906). It is also established that Congress may enact legislation to render aliens deportable because of past conduct. *U. S. ex rel Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950). Since deportation proceedings are not criminal in nature, the proscription against *ex post facto* laws does not apply. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951); *Mahler v. Eby*, 264 U.S. 32 (1923). We have examined the cases cited by the respondent's counsel and do not find them to be applicable to this proceeding. Whatever limitations may exist in other fields upon the enactment of retroactive legislation, no such prohibition exists with respect to deportation proceedings. *Harisiades v. Shaughnessy*, (supra); *U. S. ex rel Marcello v. Ahrens*, (supra). As was stated by the court in *Kaloudis v. Shaughnessy*, 18 F. (2d) 489, at p. 490:

The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate.

If the respondent has any rights which are preserved, they must be preserved by Congressional mandate. Since the Act of February 5, 1917, as amended, was repealed by Section 403(a)(13) of the Immigration and Nationality Act, only those matters are preserved which fall within the scope of Section 405(a) of the Immigration and Nationality Act. The pertinent portion of that section provides as follows:

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Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect, or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any

Cal., 1954);⁵ *Yanish v. Barber*, 128 F. Supp. 240 (N. D. Cal., 1955);⁶ *Petition of Pringle*, 122 F. Supp. 90 (E. D. Va., 1953), aff'd per curiam sub nom. *United States v. Pringle*, 212 F. (2d) 878 (4. Cir., 1954). On occasion, this uniformly broad interpretation has led to a result adverse to the alien. See *United States v. Matthes-Friedman*, 115 F. Supp. 261 (E. D. N. Y., 1953); *United States ex rel. Circella v. Neely*, 115 F. Supp. 615, 625-626 (N. D. Ill., 1953).

It should be pointed out that the argument advanced by the appellee would make the savings clause all but meaningless. The effect of his argument is that where there has been a specific *change* in the law relating to deportation, the savings clause has no application. Yet it is only when there has been such a change that the savings clause is of any moment at all. As pointed out in the *Shomberg* opinion, "Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play. Only then is a specific exception to § 405 required." 348 U. S. at 546.

On the other hand, the conclusion we have reached does no violence to the provisions of section 241(d) of the Act; 8 U. S. C. A., Section 1251(d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor statutes, among them specifically the 1917 and 1924 Acts.⁷ The purpose and effect of section 241(d) is therefore to remove any

⁵ "The saving clause in the 1952 Act is one of unusual breadth as is appropriate in a statute which effects a complete revision of the immigration and nationality laws of the nation. The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon preexisting statuses and conditions, and the Congressional desire to avoid such effects in so far as possible." 119 F. Supp., at p. 613.

⁶ "It is difficult to imagine a more inclusive savings clause than the one just quoted." 128 F. Supp., at p. 242.

⁷ 66 Stat. 279.

Inquiry Officer of the Immigration and Naturalization Service he was ordered to be deported in the manner provided by law on the charges contained in the warrant of arrest. Following an unsuccessful appeal to the Board of Immigration Appeals he sought a writ of habeas corpus in the district court. He is here on an appeal from the district court's order denying the writ.

Carson is about fifty-four years old. He was born in Italy and entered the United States as a stowaway in 1919. Under the Immigration Act of February 5, 1917, then in effect, deportation proceedings could have been brought against him at any time within five years after his entry as a stowaway. No such proceedings were brought, and relator thereafter became immune from deportation on the stowaway charge under then existing law.¹

28 In 1936 Carson was convicted in Ohio courts of two separate offenses of blackmail and was sentenced to a prison term of one to five years upon each conviction. After his release from prison in 1941 deportation proceedings were commenced against him under a warrant of arrest issued in 1937, based upon these two criminal convictions. In 1945 the outstanding order of deportation was withdrawn and the proceedings were terminated when the Governor of Ohio granted a conditional pardon for the second of his two convictions. This pardon was granted to Carson "From this time forward, conditioned upon good behavior and conduct and provided that he demeans himself as a law-abiding person and is not convicted of any other crime, otherwise this pardon to become null and void." It is conceded that the pardon granted to Carson was sufficient to confer immunity to deportation under the law then in effect.²

¹ Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 874, 889; 8 U. S. C. (1934 Ed.), Section 155, provided: "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law . . ." shall be deported. Stowaways were among the classes excluded at the time of appellant's entry under Section 3 of the 1917 Act, 39 Stat. 876; 8 U. S. C. (1934 Ed.) Section 136(1).

² Section 19(a) of the Immigration Act of 1917, as amended, 54 Stat. 671; 8 U.S.C. (1946 Ed.), Section 155(a),

status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect, but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, *unless otherwise specifically provided therein*, hereby continued in force and effect. (Underscoring supplied).

We note that the scope of the Savings Clause is limited by the underscored phrase "unless otherwise specifically provided". Since Congress has specifically provided under Section 241(d) of the Immigration and Nationality Act for the deportation of aliens falling within the purview of Sections 241(a)(1) and 241(a)(4) of the Act, regardless of when the basis of deportability arose, whatever immunity to deportation the respondent had under the Act of 1917 was lost upon the repeal of that statute. The conclusion reached herein is amply supported by judicial and administrative decisions in similar situations. Thus, it has been held that the Immigration and Nationality Act is effective to create new classes of deportable aliens. *Matter of M—*, (supra); *U. S. ex rel Marcello v. Ahrens*, (supra); *U. S. ex rel Barile v. Murff*, (supra). It has also been held that the Immigration and Nationality Act has effectively removed bars to deportation existing under the Act of February 5, 1917, as amended, where such bars were based upon a statute of limitations (*Matter of I—*, E-25308, B.I.A. July 21, 1953, Int. Dec. 469); or upon a timely recommendation against deportation, (ibid); or upon a legislative pardon. (*Matter of R—*, E-080924, B.I.A. January 14, 1954, Int. Dec. ———). We therefore conclude that the special inquiry officer properly found the respondent deportable on the warrant charges.

In the Notice of Appeal filed by counsel one of the grounds of error specified is that the special inquiry officer failed to inquire of the respondent whether he wished to apply for discretionary relief. Although this issue was not specifically raised upon the oral argument, counsel did state that the alien has completely reformed, and he therefore requested that the case be remanded to the field to conduct an appropriate investigation. Under 8 C.F.R. 242.53(c),

doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241(a)(1); 8 U. S. C. A., Section 1251(a)(1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924.⁸

The Immigration and Nationality Act is lengthy and complex. If the interplay of its here relevant sections is not entirely free from doubt, the result we have reached
34 is we think consistent with "our duty 'to give effect, if possible to every clause and word of a statute.' "

United States v. Menasche, 348 U. S., at 538-539. Moreover, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948).

The order of the district court is set aside and the case is remanded for further proceedings consistent with the views expressed in this opinion.

35:41 Petition for rehearing covering 8 pages filed January 19, 1956. Omitted from this print, it was denied and nothing more by order January 30, 1956.

⁸ The Immigration Act of 1924, 8 U. S. C. A., Section 201, et seq., effective July 1, 1924, did not contain a limitation period on deportability. Section 14 of the Immigration Act of 1924, 43 Stat. 162; 8 U. S. C. (1934 Ed.), Section 214. Therefore, an alien entering as a stow-away after that date could acquire no immunity to deportation by the passage of time. Although that section has now been repealed by the 1952 Act, such a stowaway would presumably be deportable by reason of the cited sections of the 1952 Act.

So far as the record shows, Carson has been a law-abiding person since his release from the penitentiary in 1941. He is married to a native born citizen and is the father of four native born children, two of them dependent minors. He is a carpenter and builder, earning about \$6,000 a year.

The current deportation proceedings were initiated under the provisions of the Immigration and Nationality Act, effective December 24, 1952, 66 Stat. 163. They are based upon Carson's entry as a stowaway thirty-six years ago, and upon his two criminal convictions almost twenty years ago. Though conceding that Carson had acquired a status of nondeportability prior to the passage of the 1952 Act, appellee contends that Carson has now become deportable by virtue of the provisions of that statute.

The claim that Carson is deportable by reason of having entered as a stowaway is based upon Section 241(a)(1) of the 1952 Act, 66 Stat. 204; 8 U. S. C. A., Section 1251 (a)(1). That section provides: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney-General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

As to Carson's deportability by reason of the two 1936 convictions despite his conditional pardon for one of them,

appellee relies upon Section 241(a)(4) and Section 241(b) of the 1952 Act, 8 U. S. C. A., Section

1251(a)(4) and 8 U. S. C. A., Section 1251(b). The first of these sections provides in part: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(4) . . . at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. . . ." The second of the two sections provides in part: "The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted

then in effect, provided: "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned. . . ."

advice as to discretionary relief is left to the sound judgment of the special inquiry officer. We do not consider the failure to give such advice as constituting reversible error, where as here, the alien was represented by counsel at the hearing and had a full opportunity to apply for discretionary relief at that time. Since no application for suspension of deportation or any other discretionary relief was submitted at the hearing, the relief issue is not properly before us. *Matter of M—*, E-086054, B.I.A. October 9, 1953, Int. Dec. 486. To remand the case for investigation would, therefore, serve no purpose.

Since we find no error in the order of the special inquiry officer directing deportation, the appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane, Chairman.

22 BEFORE THE BOARD OF IMMIGRATION APPEALS

WARRANT For Arrest of Alien

United States of America
Department of Justice
Immigration and Naturalization Service
Buffalo, New York

No. E-076976

To any officer in the service of the United States Immigration and Naturalization Service.

Whereas, from evidence submitted to me, it appears that the alien BRUNO CARSON alias BRUNO DOMENICO CORASANITI who entered this country at New York, New York; ex SS "La France" on the 2nd day of September, 1919 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: Sec. 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry he was within one or more of the classes of aliens exclud-

32

42

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—Filed January 30, 1956

The petition for rehearing is denied.

IN UNITED STATES COURT OF APPEALS

STIPULATION FOR SUBSTITUTION OF PARTY-APPELLEE—Filed
February 16, 1956

It is hereby stipulated and agreed by and between the respective parties hereto that the name of John M. Lehmann be substituted for that of J. S. Kershner as Officer in Charge:

(S) Henry C. Lavine, Attorney for Plaintiff-Appellant, Sumner Canary, U. S. Attorney, (S) Eben H. Cockley, Assistant U. S. Attorney.

Approved: (S) Potter Stewart, Circuit Judge.

43

Clerk's Certificate of foregoing transcript omitted in printing.

44

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1956

No. 72

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 19, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

a full and *unconditional* pardon by . . . the Governor of any of the several States. . . ." (Emphasis added.)

As to each of the grounds upon which the proposed deportation is based, appellee also calls our attention to Section 241(d) of the 1952 Act; 8 U. S. C. A., Section 1251(d). That section provides: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952."

In the district court it was contended that since Carson was not deportable under the law as it existed prior to the effective date of the 1952 Act, that statute, insofar as it sought to make his previous conduct grounds for deportation, was an *ex post facto* law and therefore violative of Article I, Section 9, of the Constitution. In a brief memorandum incorporating the findings and reasoning of the Board of Immigration Appeals, the district court rejected this contention and denied the writ.

In this respect the court's conclusion was entirely correct, and supported by unambiguous authority: "And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation." *Galvan v. Press*, 347 U. S. 522, at 531 (1954). "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severity. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we

30 leave the law on the subject as we find it." *Hgrisiades v. Shaughnessy*, 342 U. S. 580, at 587-588 (1952).

"The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate." *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. (2d) 489, 490 (2 Cir., 1950). So if the question here

ble by the law existing at the time of such entry, to wit, a stowaway, under sec. 3 of the Act of Feb. 5, 1917, and, Sec. 241(a)(4) of the Immigration and Nationality Act, in that, he at any time after entry, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, blackmail and blackmail.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1953." Authority has been granted for release under bond in the sum of \$10,000.00.

For so doing, this shall be your sufficient warrant. Witness my hand and seal this 23rd day of June, 1953.

R. G. Haberstroh, Chief, Investigation and Deportation Section.

23

Office at Cleveland, Ohio

Date June 24, 1953

WARRANT FOR ARREST OF
Bruno Carson alias Bruno Domencio Corasaniti

Served by me at Cleveland, Ohio on June 24, 1953, at 2:15 p.m. Alien was then informed as to cause of arrest, the conditions of release, advised as to right of counsel and furnished with a copy of this warrant.

ARTHUR H. LAUENDIEN, Investigator.

Alien detained at County Jail, Cleveland, Ohio at Service expense.

were one only of the power of Congress to deport Carson, the answer would seem clear that that power exists.

The unanswered question in this case, however, is not what Congress had the power to do, but what it did do. As to that, the above-cited statutory provisions, standing alone, would appear to give a clear answer, and require affirmance of the district court's order denying the writ of habeas corpus. But these provisions do not stand alone.

Section 405 of the 1952 Act, 8 U. S. C. A., Section 1101, note p. 156, contains a broad general savings clause. This clause provides in material part as follows:

“(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of . . . any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such . . . statutes [sic], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . .”

This section therefore preserves Carson's status of non-deportability, “unless otherwise specifically provided” in the Act. It is appellee's contention that the Act does “otherwise specifically provide,” in the above-cited sections upon which he relies. Relator insists that the quoted sections do not “otherwise specifically provide.” Upon the resolution of that issue depends the disposition of this appeal.

The scope of the savings clause has recently been examined by the Supreme Court in two cases decided the same day, *United States v. Menasche*, 348 U. S. 528 (1955) and *Shomberg v. United States*, 348 U. S. 540 (1955). Though both cases involved the naturalization rather than the deportation provisions of the 1952 Act, the analysis the opinions make of the savings clause is significantly helpful in determining the questions at issue in the present case.

In the *Menasche* case it was held that the savings clause operated to protect the alien's previously acquired status.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	2
Question presented.....	2
Statutes involved.....	2
Statement.....	6
Reasons for granting the writ.....	9
Conclusion.....	20
Appendix.....	21

CITATIONS

Cases:

<i>Bridges v. United States</i> , 346 U. S. 209.....	20
<i>Campbell v. Holt</i> , 115 U. S. 620.....	20
<i>Chase Securities Corp. v. Donaldson</i> , 325 U. S. 304.....	20
<i>DeLuca, United States ex. rel. v. O'Rourke</i> , 213 F. 2d 758.....	11, 14
<i>Evans v. Murff</i> , 135 F. Supp. 907.....	14
<i>Gagliano v. Bonds</i> , 222 F. 2d 958, certiorari denied, 350 U. S. 902.....	10, 11
<i>Marcello v. Bonds</i> , 349 U. S. 302.....	10, 11, 18, 20
<i>Pino v. Landon</i> , 349 U. S. 901.....	10, 13
<i>Pino v. Nicolls</i> , 215 F. 2d 237.....	10, 12, 18
<i>Robles-Rubio, ex parte</i> , 119 F. Supp. 610.....	15
<i>Sciria, United States ex rel. v. Lehmann</i> , 136 F. Supp. 458.....	9, 14
<i>Shomberg v. United States</i> , 348 U. S. 540.....	10, 16
<i>United States v. Menasche</i> , 348 U. S. 528.....	10, 17
<i>Wong Kay Suey v. Brownell</i> , 227 F. 2d 41, certiorari denied, 350 U. S. 969.....	12, 18

Statutes:

Page

The Immigration Act of February 5, 1917, 39 Stat. 874:

Sec. 3 7, 22

Sec. 19 5, 6, 8, 22

The Immigration Act of May 26, 1924, 43 Stat.

162, Sec. 14 7

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163:

Sec. 241 (a) (1), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (1) 2, 3

Sec. 241 (a) (4), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (4) 3, 15

Sec. 241 (b), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (b) 3, 15

Sec. 241 (d), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (d) 4, 10, 12

Sec. 405 (a), 66 Stat. 280, 8 U. S. C. (1952 ed.) 1101 note 4

Miscellaneous:

1953 report of the President's Commission on Immigration and Nationality, *Whom We Shall Welcome*, p. 198 19

S. Rep. 1515, 81st Cong., 2nd Sess. 19

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

JOHN M. LEHMANN, OFFICER IN CHARGE,
PETITIONER¹

v.

UNITED STATES OF AMERICA EX REL. BRUNO CARSON
OR BRUNO CARASANITI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing the order of the United States District Court for the Northern District of Ohio, which had denied respondent's petition for a writ of habeas corpus, and remanding the case for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, pp. 21-32, is reported at

¹ John M. Lehmann was substituted for J. S. Kershner on February 16, 1956 (see App. *infra*, p. 33).

228 F. 2d 142. The memorandum opinion of the District Court appears in the record (R. 49-50).²

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1955 (App., *infra*, p. 32). A timely petition for rehearing was denied on January 30, 1956 (App., *infra*, p. 33). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether respondent, who is otherwise deportable under Sections 241 (a) (1) and (4) of the Immigration and Nationality Act of 1952 as an alien who entered this country as a stowaway in 1919 and committed two crimes in 1935, but who was not deportable at the time the 1952 Act went into effect, had a "status" of non-deportability which was preserved to him by the savings clause of the 1952 Act despite the fact that Section 241 (d) of that Act expressly makes retroactive the grounds for deportation specified in the Act.

STATUTES INVOLVED

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

Section 241 (a) (1), 66 Stat. 204, 8
U. S. C. (1952 ed.) 1251 (a) (1):

² The original record in the Court of Appeals and respondent's exhibit A, consisting of his immigration file, have been paginated consecutively, the numbers appearing in the lower right hand corner.

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Section 241 (a) (4), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (4):

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

Section 241 (b), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (b):

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the

Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter; a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Section 241 (d), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (d):

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act; or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 405 (a), 66 Stat. 280, 8 U. S. C. (1952 ed.) 1101 note:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of

exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * *

Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, * * *

STATEMENT.

This is a habeas corpus proceeding instituted by respondent in the United States District Court for the Northern District of Ohio to challenge the legality of his detention under a warrant of deportation dated January 19, 1954 (R. 67). Respondent was found deportable under Section 241 (a) (1) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2-3), as an alien who; at the time of entry, ~~was~~ excludable by the law existing at the time of entry, *i. e.*, a stowaway under section 3 of the Immigration Act of February 5, 1917 (R. 67); and also under Section 241 (a) (4) of the 1952 Act (*supra*, p. 3) as an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct (R. 67).

The relevant facts may be summarized as follows:

Respondent, a native and citizen of Italy, entered this country in 1919 as a stowaway (R. 103). The pertinent law then in effect was Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 889, which provided (*supra*, p. 5):

That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States;

* * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * *

Stowaways were among the classes excluded at the time of respondent's entry under the provisions of section 3 (a) of the 1917 Act, 39 Stat. 876. He was not, however, deported within the five year period of limitations contained in the 1917 Act.³

On January 15, 1936, respondent was convicted in the Common Pleas Court, Cuyahoga County, Ohio, of the crime of blackmail committed on or about December 11, 1935 (R. 118). He was also convicted on April 25, 1936, in the Common Pleas Court, Lorain County, Ohio, of the crime of blackmail committed on or about October 15, 1935 (R. 119). A warrant of arrest for deportation was issued in 1937 against respondent based upon these two convictions (R. 96). In 1945, the outstanding order of deportation against respondent was withdrawn when the Governor of Ohio granted respondent a conditional pardon for the second of his two convictions (R. 96-97). The pardon was granted to respondent "From this time forward, conditioned upon good behavior and conduct and provided that he demeans him-

³ Section 14 of the Immigration Act of May 26, 1924, 43 Stat. 162, made an alien entering illegally deportable at any time, but was not retroactive. It therefore did not affect the limitation against respondent's deportability which occurred upon the passage of the five year statutory period of limitations under the 1917 Act.

self as a law abiding person and is not convicted of any other crime, otherwise this pardon to become null and void" (R. 123). This pardon was considered sufficient by immigration officials to confer immunity to deportation under the law then in effect, Section 19 of the Immigration Act of 1917 (R. 97), which provided (*supra*, p. 5):

* * * *Provided further*, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned * * *.

The present warrant of arrest was issued against respondent on June 23, 1953 (R. 115). After a hearing (R. 100-114), he was ordered deported by a Special Inquiry Officer (R. 99). The order of deportation was affirmed in a memorandum opinion of the Board of Immigration Appeals on January 19, 1954 (R. 71-77), which discussed the question of whether respondent had acquired a non-deportable status protected by the savings clause of the 1952 Act, Section 405 (a), *supra*, pp. 4-5 (R. 75-76).

Respondent then filed this petition for a writ of habeas corpus, alleging that the charges against him as a stowaway were based on the Immigration Act of 1917 which carried a statute of limitation of five years, and that he had been granted a pardon as to one of the crimes alleged in the charge of conviction for two crimes (R. 3-5). Relying upon the reasons stated and authorities cited in the memorandum opinion of the

Board of Immigration Appeals, the District Court denied the petition (R. 50).⁴

The Court of Appeals reversed, holding that as to both charges respondent had a status of non-deportability within the scope of the savings clause of the 1952 Act, and that the retroactive language of Section 241 (d) (*supra*, p. 4) was not a clear manifestation of intent to withdraw the protection of the savings clause (App., *infra*, pp. 21-32). In reversing the lower court, however, the Court of Appeals indicated that the interplay between the relevant sections was not entirely free from doubt (App., *infra*, p. 32).

REASONS FOR GRANTING THE WRIT

The Court of Appeals, although noting that the issue is not free from doubt, has held that before 1952 respondent acquired a status of non-deportability which was preserved to him under the savings clause of the 1952 Act, even though he is a member of two of the classes of excludable aliens described in Section 241 (a) of that Act, and even though Section 241 (d) expressly provides:

Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belong-

⁴ Contrary to his decision in this case, the same district judge subsequently held in *United States ex rel. Sciria v. Lehmann*, 136 F. Supp. 458 (N. D. Ohio), that an alien entering as a stowaway before 1924 acquired a status of non-deportability when the statute of limitations had run, and that the status was preserved by the savings clause of the 1952 Act. This case is on appeal in the Sixth Circuit.

ing to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act. [Emphasis added.]

As we develop below, the decision of the Sixth Circuit conflicts with that of the Court of Appeals for the Fifth Circuit in *Gagliano v. Bonds*, 222 F. 2d 958, 959 (C. A. 5), certiorari denied, 350 U. S. 902, holding that the savings clause is inapplicable to the conditions of deportability spelled out in Section 241 which are not expressly made prospective. It is also contrary to the implications of the ruling of this Court in *Marcello v. Bonds*, 349 U. S. 302, and that of the First Circuit in *Pino v. Nicolls*, 215 F. 2d 237, 246 (C. A. 1) (reversed on other grounds in *Pino v. Landon*, 349 U. S. 901), that conditions of deportability specified in Section 241 apply to aliens who were not, before the 1952 Act, deportable on such grounds. In addition, the decision below misapplies the holdings of this Court in *United States v. Menasche*, 348 U. S. 528 and *Shomberg v. United States*, 348 U. S. 540, when it declares that Section 241 (d) is not a clause making specific provision for the retroactive application of the conditions of deportability spelled out in Section 241, so as to render the savings clause of Section 405 inapplicable by its own terms.

The issue is one of continuing importance since the relation of the savings clause to the grounds of deportability spelled out in Section 241 of the 1952 Act will affect the standing of a large number of aliens for years to come. Not only the court below in this case, but the Court of Appeals for the Eighth Circuit in *United States ex rel. De Luca v. O'Rourke*, 213 F. 2d 758, 764 (C. A. 8), expressed doubts as to the interplay between the two sections. This interplay has also been a source of confusion in the district courts. The issue is, therefore, one which should be resolved by this Court.

1. *Marcello v. Bonds*, 349 U. S. 302, and *Gagliano v. Bonds*, 222 F. 2d 958 (C. A. 5), certiorari denied, 350 U. S. 902, both involved aliens who had been convicted before 1952 of narcotic violations which were not at the time grounds for deportation. Section 241 (a) (11) of the 1952 Act (8 U. S. C. 1251 (a) (11)), made a conviction at any time of a crime relating to the illicit traffic in narcotic drugs, a ground of deportation. *Marcello*, in a supplemental petition for certiorari which was denied (348 U. S. 805) and *Gagliano* before the Court of Appeals and in his petition for a writ of certiorari, each argued that, since his conviction was not a ground for deportation at the time it was entered, he had a status of non-deportability which was preserved under the savings clause of the 1952 Act. While this Court did not expressly pass upon the savings

clause issue in the *Marcello* decision, it did uphold the constitutionality of the retroactive application of the new grounds for deportation spelled out in Section 241 (a) (11). 349 U. S. at 314. And in *Gagliano* the Fifth Circuit ruled that any reliance upon the savings clause to preserve a status of non-deportability was foreclosed by *Marcello*. Thus, *Marcello* implicitly, and *Gagliano* explicitly, held that the savings clause does not apply to grounds of deportation specified in Section 241 which are not by their own terms made applicable only prospectively.

Similarly, *Pino v. Nicholls*, 215 F. 2d 237, 246 (C. A. 1), involved an alien who before 1952 could not have been deported—in that case because one of the two crimes of which he had been convicted did not result in a prison sentence. After the 1952 Act made conviction for two crimes ground for deportation, regardless of whether a prison sentence had been imposed, the Court of Appeals for the First Circuit held the alien to be deportable, pointing out that subsection (d) of Section 241 laid to rest any doubt as to the retroactive effect of the section.⁵ The subsequent decision of this Court, holding that the alien had never been actually convicted of

⁵ In *Wong Kay Suey v. Brownell*, 227 F. 2d 41, 43 (C. A. D. C.), certiorari denied, 350 U. S. 969, the Court of Appeals for the District of Columbia Circuit also expressly recognized that Section 241 (d) constituted a specific exception to the savings clause, in contrast to the provision involved in that case (Sec. 360(a)).

the crime involved, (*Pino v. Landon*, 349 U. S. 901), did not affect the reasoning of the First Circuit on the issue of retroactivity.

While the particular grounds of deportation in the instant case are different, the holding of the court below is in substantial conflict with *Marcello*, *Pino*, and *Gagliano*. These cases held that grounds of deportability set forth in Section 241 have retroactive effect and apply to a condition existing before the 1952 Act which was not, before the enactment of that statute, a basis of deportation. In this case, on the other hand, the Court of Appeals has held that the prior condition of non-deportability was a "status" which was saved by the savings clause, even though the literal language of the governing subsections of Section 241, standing alone, admittedly applies here (App., *infra*, p. 26). There are no factual differences justifying this variance in result. That petitioner had previously become non-deportable as a stowaway because of the passing of the former statute of limitations, or non-deportable for his criminal convictions because of the conditional pardon, does not make his case different, with respect to the retroactive effect of Section 241, from those of *Marcello* and *Gagliano* whose prior convictions were not at the time they were entered deemed crimes involving moral turpitude, or *Pino* whose prior conviction was not originally a ground of deportation because no prison sentence was imposed. We believe, with

1954);⁴ *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N. D. Cal., 1954);⁵ *Yanish v. Barber*, 128 F. Supp. 240 (N. D. Cal., 1955);⁶ *Petition of Pringle*, 122 F. Supp. 90 (E. D. Va., 1953), *aff'd per curiam sub nom. United States v. Pringle*, 212 F. (2d) 878 (4 Cir., 1954). On occasion, this uniformly broad interpretation has led to a result adverse to the alien. See *United States v. Matles-Friedman*, 115 F. Supp. 261 (E. D. N. Y., 1953); *United States ex rel. Circella v. Neelly*, 115 F. Supp. 615, 625-626 (N. D. Ill., 1953).

It should be pointed out that the argument advanced by the appellee would make the savings clause all but meaningless. The effect of his argument is that where there has been a specific *change* in the law relating to deportation, the savings clause has no application. Yet it is only when there has been such a change that the savings clause is of any moment at all. As pointed

⁴ "It would appear from the language of this reservation that Congress, as a measure of policy or precaution, intended to preserve the effectiveness of all subsisting proceedings, orders, or judgments fixing or determining individual statuses, obligations, liabilities, or rights; and for this purpose to have continued in force the statutes or parts thereof under which such status, obligation, liability or right became fixed or determined." 211 F. (2d), at p. 470.

⁵ "The saving clause in the 1952 Act is one of unusual breadth as is appropriate in a statute which effects a complete revision of the immigration and nationality laws of the nation. The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon preexisting statuses and conditions, and the Congressional desire to avoid such effects in so far as possible." 119 F. Supp., at p. 613.

⁶ "It is difficult to imagine a more inclusive savings clause than the one just quoted." 128 F. Supp., at p. 242.

the First and Fifth Circuits, that Congress has, in the 1952 Act, changed the law to make inapplicable the previous reason why in each instance deportation could not be effected. But since the court below has come to a different conclusion on this basic issue from that of the other circuits, there exists a conflict which should be resolved.

2. In addition to this conflict of circuits, some confusion exists among the courts as to the effect of the savings clause on deportation. As noted above, fn. 4, *supra*, p. 9, the district court which decided the instant case subsequently changed its mind and held that a stowaway not deported within the five year period specified under the 1917 Act had a status which was saved after enactment of the 1952 Act. *Sciria v. Lehmann*, 136 F. Supp. 458 (N. D. Ohio). On the other hand, in *Evans v. Murff*, 135 F. Supp. 907, 908-909 (D. Md.), now pending before the Fourth Circuit, the district court has held, *inter alia*, with relation to the same factual situation, that the savings clause does not protect the stowaway.

The court below admitted that its decision on the interplay of the savings clause and the deportation section "is not entirely free from doubt". Similar uncertainty as to the effect of the savings clause was expressed by the Court of Appeals for the Eighth Circuit in *United States ex rel. DeLuca v. O'Rourke*, 213 F. 2d 758, 764, when it held that a judicial recommendation of nondeportability as to a narcotics violation before

out in the *Shomberg* opinion, "Only when something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play. Only then is a specific exception to § 405 required." 348 U. S. at 546.

On the other hand, the conclusion we have reached does no violence to the provisions of section 241 (d) of the Act; 8 U. S. C. A., Section 1251 (d); making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor status, among them specifically the 1917 and 1924 Acts.⁷ The purpose and effect of section 241 (d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241 (a) (1); 8 U. S. C. A., Section 1251 (a) (1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924.⁸

⁷ 66 Stat. 279.

⁸ The Immigration Act of 1924, 8 U. S. C. A., Section 201, et seq., effective July 1, 1924, did not contain a limitation period on deportability. Section 14 of the Immigration Act of 1924, 43 Stat. 162; 8 U. S. C. (1934 Ed.), Section 214. Therefore, an alien entering as a stowaway after that date could acquire no immunity to deportation by the passage of time. Although that section has now been repealed by the

1952 remained effective to bar deportation for that offense under the 1952 Act. Irrespective of the validity of that decision, we think the doubts expressed by the two circuits as to the effect of the savings clause in this field, as well as the basic conflict discussed above, demonstrate the necessity for consideration of the issue by this Court.

3. Congress has explicitly expressed its intention that the grounds of deportation spelled out in the parts of Section 241 involved here shall have retrospective application. The savings clause, Section 405 (a), states that no "status" acquired under prior law is to be affected by the new Act "unless otherwise specifically provided therein." Section 241 (d) (*supra*, pp. 4, 10) does specifically provide otherwise. It begins with an

* In the *DeLuca* case and in *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N. D. Cal.), the aliens were ordered deported under Section 241 (a) (11) of the 1952 Act, for narcotic violations committed prior to the 1952 Act and for which each had obtained a judicial recommendation against deportation that barred their deportation under prior law. A judicial recommendation against deportation continues to bar deportation under Section 241 (b) of the 1952 Act, *supra*, pp. 3-4. However, Section 241 (b) expressly applies only to those being deported under Section 241 (a) (4) for commission of crimes involving moral turpitude, whereas narcotic violators are now ordered deported under another Section, 241 (a) (11). The underlying issue to be resolved by the courts in *DeLuca* and *Robles-Rubio* was, therefore, whether Congress intended a judicial recommendation to continue to bar deportation of narcotic violators. This is quite a different substantive issue from that presented here. Each court found the question debatable and resorted to the savings clause to resolve the issue favorably to the aliens. 213 F. 2d at 764-765; 119 F. Supp. at 613-614.

The Immigration and Nationality Act is lengthy and complex. If the interplay of its here relevant sections is not entirely free from doubt, the result we have reached is we think consistent with "our duty 'to give effect, if possible to every clause and word of a statute.'" *United States v. Menasche*, 348 U. S., at 538-539. Moreover, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor: *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948).

The order of the district court is set aside and the case is remanded for further proceedings consistent with the views expressed in this opinion.

JUDGMENT

(Filed December 17, 1955)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded to the District Court for further proceedings consistent with the views expressed in the opinion herein.

1952 Act, such a stowaway would presumably be deportable by reason of the cited sections of the 1952 Act.

explicit exception of its own: "Except as otherwise specifically provided in this *section*" (emphasis added); it does not say "except as otherwise specifically provided in this *Act*" so as to encompass Section 405 (a) within its exemption. Section 241 (d) then states in plain language that the provisions of Section 241 (a) shall apply to all aliens "notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." The section's explicit exemption clause manifests a Congressional intent that no exceptions be found outside that section and the section's "notwithstanding" clause abolishes any "status" of nondeportability respondent might have enjoyed under prior law. Under these linked provisions, the general language of the savings clause must succumb to the specific provisions of Section 241 (d), contrary to the holding of the court below that the savings clause "supersedes" the provisions of Section 241 (d).

The decision below thus misapplies this Court's decisions in *Shomberg v. United States*, 348 U. S.

The court below said (App., *infra*, p. 31) :

"* * * The purpose and effect of section 241 (d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as *they are not superseded by the savings provisions of section 405.* * * *" [Emphasis added.]

ORDER DENYING REHEARING

(Filed January 30, 1956)

The Petition for rehearing is denied.

STIPULATION FOR SUBSTITUTION OF PARTY—
APPELLEE

(Filed February 16, 1956)

It is hereby stipulated and agreed by and between the respective parties hereto that the name of John M. Lehman be substituted for that of J. S. Kershner as Officer in Charge.

(S) HENRY C. LAVINE,
Attorney for Plaintiff-Appellant.

SUMNER CANARY,
U. S. Attorney.

(S) EBEN H. COCKLEY,
Assistant U. S. Attorney.

APPROVED: (S) POTTER STEWART,
Circuit Judge.

540, and *United States v. Menasche*, 348 U. S. 528, both of which dealt with the relationship of the savings clause to sections of Title III of the Immigration and Nationality Act of 1952 dealing with nationality and naturalization. In *Menasche*, the Court reviewed the history of this type of savings clause and concluded that its whole development shows a well established congressional policy not to strip aliens of advantages gained under prior laws. 348 U. S. at pp. 531-535. Since the Court found no specific exception to the savings clause in the rest of the 1952 Act, it held that *Menasche* gained an inchoate right by filing a declaration of intention under the prior law which was preserved to him by the savings clause. 348 U. S. at 539. In *Shomberg*, however, the Court found a specific exemption to the savings clause in Section 318 which commenced with the words "Notwithstanding the provisions of Section 405 (b)" and held therefore that Shomberg's right, gained under prior law, was not preserved. The following language of the Court is pertinent here:

* * * In using the "notwithstanding" language in these sections, Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of the savings clause. In *United States v. Menasche, supra*, we recognized the wide scope to be given the savings clause. We would be lax in our duty if we did not give recognition also

to the congressional purpose to override the savings clause when other considerations were thought more compelling than the preservation of the *status quo*. * * *

348 U. S. at 547-548.

The court below, using the words "notwithstanding the provisions of section 405 (b)" as the standard of what constitutes a clear exception, concluded that the language of Section 241 (d) did not meet the test. Congress is not, however, required to use "magical passwords" to effectuate an exemption from the provisions of a clause in a statute or another statute. Cf. *Marcello v. Bonds*, 349 U. S. at 310. The language of Section 241 (d) is, we think, as clear as the language of Section 318 in expressing the Congressional purpose that those grounds of deportation in Section 241 which were not expressly made effective prospectively should have general retroactive scope.⁸ See *Wong Kay Suey v. Brownell*, 227 F. 2d 41, 43 (C. A. D. C.), certiorari denied, 350 U. S. 969, *supra*, p. 12, fn. 5. The rationale of *Shomberg*, rather than *Menasche*, should properly have been applied in this case.

4. An interpretation of Section 241 (d) to reach those in respondent's position accords with the purpose of Congress as reflected in the changes it made in the Immigration Act of 1917.

⁸ As pointed out by the First Circuit in *Pino*, 215 F. 2d at 246, when Congress wished a ground for deportation in Section 241 to have only prospective effect, it used the word "hereafter." *E. g.*, 241 (a) (3).

under which respondent obtained his alleged status of non-deportability. In recommending the abolition of the then existing five-year statute of limitation in Section 19 of the 1917 Act, *supra*, p. 5, on deportation of aliens excludable at the time of entry, the report of the Committee on the Judiciary observed: “* * * If the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time as they are within the 5 years after entry.” (S. Rep. 1515, 81st Cong., 2nd Sess., p. 389).⁹ Congress also changed Section 19 of the 1917 Act, *supra*, p. 5—which made the deportation provision for commission of crimes involving moral turpitude inapplicable “to one who has been pardoned”—to read “in the case of any alien who has * * * been granted a full and unconditional pardon”, in Section 241 (b) of the 1952 Act. This change was obviously made in disapproval of the ruling, under the 1917 law, by the Board of Immigration Appeals that the conditional type of pardon granted to respondent was a “pardon” within the purview of the 1917 Act. This display of Congressional lack of

⁹ The 1953 report of the President's Commission on Immigration and Nationality, *Whom We Shall Welcome*, at page 198, interpreted this change as we do:

“Indeed, the 1952 statute retroactively rescinded the limited statute of limitations fixed by previous law. An alien who entered the United States 25 years ago, and whose entry involved a purely technical violation, enjoyed immunity from deportation for the last 20 years. Under the 1952 Act, he is now again subject to deportation. * * *

sympathy for those in respondent's position, coupled with the express language of Section 241 (d) making the grounds of deportation retroactive, indicates that Congress intended an alien such as respondent to be deported.

Congress has the power to deport for acts done in the past. *Marcello v. Bonds*, 349 U. S. 302, 314. It has the power to take away or reinstate a remedy such as the statute of limitations.¹⁰ Cf. *Campbell v. Holt*, 115 U. S. 620, 628; *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314. Both of these powers it exercised in Section 241 of the 1952 Act.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1956.

¹⁰ In this connection, we note that, when Congress wishes to save such remedies, it does so expressly. See *Bridges v. United States*, 346 U. S. 209, 226-227. The savings clause of the 1952 Act does not mention the preserving of remedies.

APPENDIX.

No. 12361

United States Court of Appeals for the Sixth
Circuit

UNITED STATES OF AMERICA, EX REL. BRUNO CARSON
OR BRUNO CARASANITI, APPELLANT

v.

J. S. KERSHNER, OFFICER IN CHARGE, APPELLEE

Appeal from the United States District Court
for the Northern District of Ohio, Eastern
Division.

Decided December 17, 1955.

Before MARTIN, MILLER and STEWART, Circuit
Judges.

STEWART, Circuit Judge. A warrant of arrest in deportation proceedings was issued against the relator, Bruno Carson, in June of 1953. After a hearing before a Special Inquiry Officer of the Immigration and Naturalization Service he was ordered to be deported in the manner provided by law on the charges contained in the warrant of arrest. Following an unsuccessful appeal to the Board of Immigration Appeals he sought a writ of habeas corpus in the district court. He is here on an appeal from the district court's order denying the writ.

Carson is about fifty-four years old. He was born in Italy and entered the United States as

a stowaway in 1919. Under the Immigration Act of February 5, 1917, then in effect, deportation proceedings could have been brought against him at any time within five years after his entry as a stowaway. No such proceedings were brought, and relator thereafter became immune from deportation on the stowaway charge under then existing law.¹

In 1936 Carson was convicted in Ohio courts of two separate offenses of blackmail and was sentenced to a prison term of one to five years upon each conviction. After his release from prison in 1941 deportation proceedings were commenced against him under a warrant of arrest issued in 1937, based upon these two criminal convictions. In 1945 the outstanding order of deportation was withdrawn and the proceedings were terminated when the Governor of Ohio granted a conditional pardon for the second of his two convictions. This pardon was granted to Carson "From this time forward, conditioned upon good behavior and conduct and provided that he demean himself as a law-abiding person and is not convicted of any other crime, otherwise this pardon to become null and void." It is conceded that the pardon granted to Carson was sufficient to confer

¹ Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 874, 889; 8 U. S. C. (1934 Ed.), Section 155, provided: "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law * * * "shall be deported. Stowaways were among the classes excluded at the time of appellant's entry under Section 3 of the 1917 Act, 39 Stat. 876; 8 U. S. C. (1934 Ed.) Section 136 (1).

immunity to deportation under the law then in effect.²

So far as the record shows, Carson has been a law-abiding person since his release from the penitentiary in 1941. He is married to a native born citizen and is the father of four native born children, two of them dependent minors. He is a carpenter and builder, earning about \$6,000 a year.

The current deportation proceedings were initiated under the provisions of the Immigration and Nationality Act, effective December 24, 1952, 66 Stat. 163. They are based upon Carson's entry as a stowaway thirty-six years ago, and upon his two criminal convictions almost twenty years ago. Though conceding that Carson had acquired a status of nondeportability prior to the passage of the 1952 Act, appellee contends that Carson has now become deportable by virtue of the provisions of that statute.

The claim that Carson is deportable by reason of having entered as a stowaway is based upon Section 241 (a) (1) of the 1952 Act, 66 Stat. 204; 8 U. S. C. A., Section 1251 (a) (1). That section provides: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— (1) at the time of entry was within one or more

² Section 19 (a) of the Immigration Act of 1917, as amended, 54 Stat. 671; 8 U. S. C. (1946 Ed.), Section 155 (a), then in effect, provided: "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned. * * *

of the classes of aliens excludable by the law existing at the time of such entry." As to Carson's deportability by reason of the two 1936 convictions despite his conditional pardon for one of them, appellee relies upon Section 241 (a) (4) and Section 241 (b) of the 1952 Act, 8 U. S. C. A., Section 1251 (a) (4) and 8 U. S. C. A., Section 1251 (b). The first of these sections provides in part: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. * * *" The second of the two sections provides in part: "The provisions of subsection (a) (4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and *unconditional* pardon by * * * the Governor of any of the several States. * * *" [Emphasis added.]

As to each of the grounds upon which the proposed deportation is based, appellee also calls our attention to Section 241 (d) of the 1952 Act; 8 U. S. C. A., Section 1251 (d). That section provides: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enu-

merated in subsection (a) of this section, occurred prior to June 27, 1952."

In the district court it was contended that since Carson was not deportable under the law as it existed prior to the effective date of the 1952 Act, that statute, insofar as it sought to make his previous conduct grounds for deportation, was an *ex post facto* law and therefore violative of Article I, Section 9, of the Constitution. In a brief memorandum incorporating the findings and reasoning of the Board of Immigration Appeals, the district court rejected this contention and denied the writ.

In this respect the court's conclusion was entirely correct, and supported by unambiguous authority. "And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation." *Galvan v. Press*, 347 U. S. 522, at 531 (1954). "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severity. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it." *Harisiades v. Shaughnessy*, 342 U. S. 580, at 587-588 (1952). "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate." *United States ex rel. Ka-*

loudis v. Shaugnessy, 180 F. (2d) 489, 490 (2 Cir., 1950). So if the question here were one only of the power of Congress to deport Carson, the answer would seem clear that that power exists.

The unanswered question in this case, however, is not what Congress had the power to do, but what it did do. As to that, the above-cited statutory provisions, standing alone, would appear to give a clear answer, and require affirmance of the district court's order denying the writ of habeas corpus. But these provisions do not stand alone.

Section 405 of the 1952 Act, 8 U. S. C. A., Section 1101, note p. 156, contains a broad general savings clause. This clause provides in material part as follows:

“(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of * * * any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such * * * statutes [sic]; conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *”

This section therefore preserves Carson's status of nondeportability, “unless otherwise specifically provided” in the Act. It is appellee's contention that the Act does “otherwise specifically provide,” in the above-cited sections upon which he relies. Relator insists that the quoted sections do

not "otherwise specifically provide." Upon the resolution of that issue depends the disposition of this appeal.

The scope of the savings clause has recently been examined by the Supreme Court in two cases decided the same day, *United States v. Menasche*, 348 U. S. 528 (1955) and *Shomberg v. United States*, 348 U. S. 540 (1955). Though both cases involved the naturalization rather than the deportation provisions of the 1952 Act, the analysis the opinions make of the savings clause is significantly helpful in determining the questions at issue in the present case.

In the *Menasche* case it was held that the savings clause operated to protect the alien's previously acquired status. The Court traced the origin and development in our immigration and naturalization statutes of this savings provision. 348 U. S. 528, at 531-535. It was the Court's conclusion that "The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." 348 U. S. at 535.

In the *Shomberg* case the Court held that the savings provisions of section 405 of the Act did not preserve the alien's previously acquired status from the operation of section 318 of the

Act. The Court found that the relevant savings clause in that case was the one contained in section 405 (b). That section, like section 405 (a), consists of a general savings provision which applies unless "otherwise specifically provided." Since section 318 expressly states that its provisions shall be applicable "notwithstanding the provisions of section 405 (b) of this Act," the Court concluded that here was an instance where the Act had "otherwise specifically provided" and where the savings clause therefore was superseded. In passing, the Court pointed out four other places in the 1952 Act where Congress had "clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of the savings clause." 348 U. S. at 547; see footnote 5. In each instance cited the statute expressly states that a given provision shall apply "notwithstanding" the provisions of the savings clause.³

The *Menasche* and the *Shomberg* opinions thus clearly teach that the savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. It was held in the *Shomberg* case that such intent is clear where it is specifically provided that a provision shall be effective "notwithstanding" the terms of the savings clause. No such clear manifestation of intent is apparent in the present case.

We conclude that Carson's status of nondeportability is protected by section 405 of the Act, since the statutory provisions upon which appellee re-

³ See also *United States v. Strömberg*, * * * F₂ (2d) * * * (5 Cir., November 15, 1955).

lies do not constitute such specific exceptions to section 405 as are contemplated in that section in order to make it inapplicable. In reaching this conclusion we have been aided by the reasoning of a recent decision directly in point by Judge McNamee of the Northern District of Ohio, in *United States ex rel. Dominic Sciria v. John H. Lehmann*, decided October 7, 1955. In a characteristically clear and thorough opinion, Judge McNamee concluded that section 405 (a) of the Act operated to protect the status of an alien entering as a stowaway in 1922 who had acquired immunity to deportation by the passage of time under the 1917 Act. It was Judge McNamee who denied the writ of habeas corpus in the present case. In the *Sciria* opinion he expressly stated his conclusion that he had been in error in the present case, pointing out that the savings clause had not been relied upon by Carson in the hearing before him. While Judge McNamee refrained from commenting upon the other ground for deportation relied upon in the present case, i. e., the fact that the pardon Carson received was not an unconditional one, the reasoning of his opinion in the *Sciria* case would also clearly lead to the conclusion we have reached that Carson's status of nondeportability on this ground is likewise preserved by section 405 (a) of the Act.

Other federal courts have uniformly given a broad interpretation to section 405 in varying factual situations. See *United States ex rel. De Luca v. O'Rourke*, 213 F. (2d) 759 (8 Cir. 1954); *Yanish v. Barber*, 211 F. (2d) 467 (9 Cir.,

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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1956

JOHN M. LEHMANN, OFFICER IN CHARGE, PETITIONER

v.

**UNITED STATES OF AMERICA, EX REL. BRUNO CARSON
OR BRUNO CARASANTI**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Summary of argument	7
Argument	9
I. An alien who entered the United States illegally as a stowaway and who was convicted of two crimes involving moral turpitude prior to enactment of the Immigration and Nationality Act of 1952 is deportable under that Act.	10
A. The statutory language shows a clear con- gressional purpose to apply the specified grounds of deportation to conduct occur- ring prior to the 1952 Act.	10
B. The legislative history relating to stow- aways and former convictions confirms the congressional purpose to apply the specified grounds of deportation to con- duct occurring prior to the 1952 Act.	12
II. Respondent had no "status" of nondeportability which would be preserved under the savings clause of the 1952 Act	19
Conclusion	21

CITATIONS

Cases:

<i>Bridges v. United States</i> , 199 F. 2d 811, reversed on other grounds, 346 U. S. 209	21
<i>Bruner v. United States</i> , 343 U. S. 112	20
<i>Chase Securities Corp. v. Donaldson</i> , 325 U. S. 304	20
<i>Collett, Ex parte</i> , 337 U. S. 55	20
<i>Eichenlaub v. Shaughnessy</i> , 338 U. S. 521	20
<i>Galvan v. Press</i> , 347 U. S. 522	20
<i>Harisiades v. Shaughnessy</i> , 342 U. S. 580	20
<i>Mahler v. Eby</i> , 264 U. S. 32	20
<i>Marcello v. Bonds</i> , 349 U. S. 302	12, 20

Cases—Continued

	Page
<i>Mulcahey v. Catalanotte</i> , No. 435, this Term.....	7,
	9, 12, 14, 19, 21
<i>Ng Fung Ho v. White</i> , 259 U. S. 276.....	20
<i>Pearson v. Williams</i> , 202 U. S. 281.....	21
<i>Pino v. Nicolls</i> 215 F. 2d 237, reversed on other grounds, <i>sub nom. Marcello v. Bonds</i> , 349 U. S. 302.....	12, 18
<i>Pittsburgh Can Co. v. United States</i> , 113 F. 2d 821.....	20
<i>Sciria, United States ex rel. v. Lehmann</i> , 136 F. Supp. 458.....	6
<i>Shomberg v. United States</i> , 348 U. S. 540.....	12
<i>Stapf, United States ex rel. v. Corsi</i> , 287 U. S. 129.....	20
<i>United States v. Obermeier</i> , 186 F. 2d 243, certiorari denied, 340 U. S. 951.....	20

Statutes:

Immigration Act of February 5, 1917, 39 Stat. 874, 889, 8 U. S. C. (1946 ed.) 155 (a):	
Section 3.....	4
Section 19.....	4, 5, 6, 18
Immigration Act of May 26, 1924, 43 Stat. 162, 8 U. S. C. (1946 ed.) 214:	
Section 14.....	5
Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101, <i>et seq.</i> :	
Section 241.....	2, 9, 10, 11, 12, 17, 18
Section 241 (a).....	2, 7
Section 241 (a) (1).....	2, 4, 8, 11, 14, 15
Section 241 (a) (3).....	15
Section 241 (a) (4).....	2, 4, 8, 11, 18
Section 241 (a) (8).....	15
Section 241 (b).....	3, 8, 11, 17
Section 241 (d).....	3, 7, 8, 9, 10, 11, 12, 15, 19
Section 405 (a).....	2, 3, 9

Miscellaneous:

Analysis of S. 3455, 81st Cong., 2d Sess., prepared by the Immigration and Naturalization Service.....	14
Analysis of S. 716, 82d Cong., 1st Sess., prepared by the Immigration and Naturalization Service....	14-15, 17
H. Doc. No. 520, 82d Cong., 2d Sess.....	16
H. Rep. No. 1365, 82d Cong., 2d Sess.....	14, 18
H. Rep. No. 2096, 82d Cong., 2d Sess.....	15

Miscellaneous—Continued

1953 report of the President's Commission on Immigration and Nationality, <i>Whom We Shall Welcome</i>	Page 15-16
S. 3455, 81st Cong., 2d Sess.....	14
S. 716, 82d Cong., 1st Sess.....	14-15, 17
S. Rep. No. 1515, 81st Cong., 2d Sess:.....	14
S. Rep. No. 307, 82d Cong., 1st Sess.....	18
S. Rep. No. 1137, 82d Cong., 2d Sess.....	13, 14
S. Rep. No. 1137, 82d Cong., 2d Sess., Part 2.....	16

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 72

JOHN M. LEHMANN, OFFICER IN CHARGE, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. BRUNO CARSON
OR BRUNO CARASANITI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 23-31) is reported at 228 F. 2d 142. The memorandum opinion of the District Court (R. 10-11) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1955 (R. 23). A timely petition for rehearing was denied on January 30, 1956 (R. 32). The petition for a writ of certiorari was

¹ John M. Lehmann, Officer in Charge of the Cleveland office of the Immigration and Naturalization Service, was substituted as a party for J. S. Kershner on February 16, 1956 (R. 32).

filed on April 27, 1956, and was granted on November 19, 1956 (R. 32). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an alien, who entered the United States as a stowaway and committed two crimes prior to the Immigration and Nationality Act of 1952 but was not deportable therefor prior to that Act, has a protected "status" of nondeportability under the general savings clause of the Act, Section 405 (a), despite the provisions of Section 241 which make specified acts (including those committed by respondent) grounds for deportation and which expressly make these grounds retroactive "[e]xcept as otherwise specifically provided in this section."

STATUTES INVOLVED

1. The Immigration and Nationality Act of 1952 provides:

SEC. 241 [66 Stat. 204; 8 U. S. C. 1251]—

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

SEC. 405 [66 Stat. 280, 8 U. S. C. 1101 note]—

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act

shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

2. The Immigration Act of February 5, 1917, 39 Stat. 874, provided:

SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * * *Provided further*, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, * * *

STATEMENT

Respondent was found deportable on two grounds: under Section 241 (a) (1) of the Immigration and Nationality Act of 1952 (*supra*, p. 2) as an alien who, at the time of entry, was excludable by the law existing at the time of entry (*i. e.*, a stowaway under Section 3 of the Immigration Act of February 5, 1917) (R. 12); and under Section 241 (a) (4) of the 1952 Act (*supra*, p. 2) as an alien who has been convicted of two crimes involving moral turpitude (R. 13-16).

The relevant facts may be summarized as follows:

Respondent, a native and citizen of Italy, entered the United States in 1919 as a stowaway (R. 13). The pertinent law then in effect was Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 889, which provided (*supra*, p. 4):

That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * *

Respondent was not deported within the five-year period after entry (R. 14).²

On January 15, 1936, respondent was convicted in the Common Pleas Court, Cuyahoga County, Ohio, of the crime of blackmail committed on or about December 11, 1935 (R. 13). He was also convicted on April 25, 1936, in the Common Pleas Court, Lorain County, Ohio, of the crime of blackmail on or about October 15, 1935 (R. 13). Deportation proceedings were instituted against respondent based upon these two convictions, but in 1945 the Governor of Ohio granted respondent a pardon for the second of the two convictions, conditioned as follows: "from this time forward, conditioned upon good behavior and conduct and provided that he demeans himself

² Section 14 of the Immigration Act of May 26, 1924, 43 Stat. 162, made an alien, entering illegally, deportable at any time, but was not retroactive. It therefore did not affect respondent.

as a law abiding person and is not convicted of any other crime, otherwise this Pardon to become null and void" (R. 22A). At that time (R. 16), the pardon was considered sufficient by immigration officials to bar deportation under the law then in effect, Section 19 of the Immigration Act of 1917 (*supra*, p. 4), and the order of deportation was withdrawn (R. 13-14).

The instant warrant of arrest was served on respondent on June 24, 1953 (R. 20-21). After a hearing (R. 6), he was ordered deported by a Special Inquiry Officer (R. 6). The order of deportation was affirmed in a memorandum opinion of the Board of Immigration Appeals on January 19, 1954 (R. 12-20), which specifically considered the question of whether deportation of respondent was precluded by the savings clause of the 1952 Act, Section 405 (a) (*supra*, pp. 3-4), and decided the question adversely to respondent (R. 18-19).

Respondent then filed a petition for a writ of habeas corpus, seeking to rely, *inter alia*, upon the fact that under the former enactment he could not have been deported as a stowaway after five years, and upon the conditional pardon as to one of the crimes (R. 3-4). The District Court, relying upon the reasons stated and authorities cited in the memorandum opinion of the Board of Immigration Appeals, denied the petition (R. 10-11).³

³ Contrary to his decision in this case, the same district judge subsequently held in *United States ex rel. Sciria v. Lehmann*, 136 F. Supp. 458 (N. D. Ohio), that an alien entering as a stowaway before 1924 acquired a status of nondeportability after five years, and that the status was preserved by the savings clause of the 1952 Act. This case is on appeal in the Sixth Circuit.

The Court of Appeals reversed, holding that as to both charges respondent had a "status of nondeportability" under the savings clause of the 1952 Act, and that the retroactive language of Section 241 (d) (*supra*, p. 3) was not a clear manifestation of intent to withdraw the protection of the savings clause (R. 27, 29).

SUMMARY OF ARGUMENT

Section 241 (d) of the Immigration and Nationality Act of 1952 provides that the grounds for deportation in Section 241 (a) are to be applicable notwithstanding that the entry of the alien and the facts specified as grounds for deportation occurred prior to the enactment of the 1952 Act. The Government's basic argument—that the language and the legislative history of the statute show that this provision renders the general savings clause of the 1952 Act inoperative here, because Section 241 (d) is a clause which *does* "otherwise specifically provide * * *," to take deportation out of the general savings clause—is developed in the brief for the Government in the companion case, *Mulcahey v. Catalanotte*, this Term, No. 435. The present brief concentrates on the particular bases of deportation applicable to respondent: the entry as a stowaway without having been deported in the five-year period provided in the 1917 Act; and the conviction of two crimes, as to one of which respondent had received a conditional pardon.

I

A. The clauses of Section 241 on which respondent's deportation rests—Section 241 (a) (1), relating to entry as a stowaway, and 241 (a) (4) and 241 (b), relating to conviction for crime and the effect of a pardon—use such phraseology as “at the time of entry” and “at any time after entry.” This language is itself an indication of the congressional intent that the grounds there stated shall relate back to the time of the specified acts, and not to the time of the enactment of the statute. This intention is made crystal clear by the language of Section 241 (d). The general savings clause therefore has no application, since, as to these deportation grounds, Congress has “otherwise specifically provided.”

B. The legislative history shows that Congress was made fully aware that the statute, in its present form, would have the effect of subjecting to deportation persons whose deportation had been barred under the prior five-year period of limitations or on the basis of conditional pardons no longer recognized under the new Act. The congressional decision to use the present phraseology thus represents the knowing exercise of legislative judgment to render such persons deportable.

II

Aside from the overriding effect of Section 241 (d), respondent had no “status,” as that term is used in the general savings clause, to which that clause could apply. The mere failure of Congress prior to 1952 to subject aliens in respondent's circumstances to deportation cannot be construed as a general amnesty for prior misconduct or as an award of any other type of special status.

A statute of limitations does not convert an unlawful residence into a lawful one, and the running of a statute does not confer vested rights. Hence the prior statute of limitations on stowaways gave respondent no status of nondeportability. Similarly, the fact that a conditional pardon previously precluded deportation as to one offense does not mean that respondent was forever immune from deportability for his crimes.

The term "status" or "right in process of acquisition" as used in the savings clause was intended to relate to such affirmative grants as the right to naturalization or the right to derivative citizenship. No such affirmative grant is involved here.

ARGUMENT

We discuss in our brief in the companion case of *Mulcahey v. Catalanotte*, No. 435, the general considerations which we think clearly show that the general savings clause of the 1952 Act, Section 405 (a), by its own terms (*i. e.*, "unless otherwise specifically provided" in the Act) cannot apply to the grounds of deportation set forth in Section 241 of the Act because Section 241 (d) is a clause which does otherwise specifically provide. Section 241 (d) states that "[e]xcept as otherwise specifically provided *in this section*" (emphasis added) the bases of deportation set forth in that *section* shall apply notwithstanding the fact that the acts giving rise to deportation occurred prior to the enactment of the 1952 Act. This language clearly expresses the congressional purpose to make the grounds for deportation in the new Act retrospective in operation (except

where otherwise provided in Section 241), and therefore to render the general savings clause inoperative as to the grounds for deportation. And we also show in our brief in No. 435 that the congressional purpose, so clear from the language of Section 241 (d), is confirmed by the general legislative history of the statute.

In this brief, therefore, we concentrate on the particular bases of deportation here involved: the entry as a stowaway without having been deported in the five-year period fixed by the 1917 Act; and the conviction of two crimes, as to one of which respondent received a conditional pardon which barred deportation prior to the 1952 Act. We show that the same considerations apply in this case as in No. 435, and that the legislative history on these problems is further evidence of the congressional intent to apply the 1952 Act to prior offenders. We show also that ~~respondent~~ ^{respondent} ~~petitioner~~ had, in any event, no "status" of nondeportability which could be saved under the savings clause.

I

AN ALIEN WHO ENTERED THE UNITED STATES ILLEGALLY AS A STOWAWAY AND WHO WAS CONVICTED OF TWO CRIMES INVOLVING MORAL TURPITUDE PRIOR TO ENACTMENT OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 IS DEPORTABLE UNDER THAT ACT

A. The statutory language shows clear congressional purpose to apply the specified grounds of deportation to conduct occurring prior to the 1952 Act

The Immigration and Nationality Act of 1952 (*supra*, pp. 2-3) provides that any alien shall be deported who—

at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry [Sec. 241 (a) (1); emphasis added];

or who—

at any time after, entry is convicted of two crimes involving moral turpitude [Sec. 241 (a) (4); emphasis added]

unless he has been granted “a full and unconditional pardon” (Section 241 (b)).

The italicized language is itself an indication of the congressional purpose that the grounds of deportation specified in the above provisions were intended to relate back to the time of the entry of the alien, and not to the time of the enactment of the statute. But any possible doubts of the congressional intent are set at rest by the language of Section 241 (d) which states:

(d) Except as otherwise specifically provided *in this section*, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act. [Emphasis added.]

As is discussed in more detail in our brief in No. 435, this is clearly a clause which *does* “otherwise specifically provide * * *” so as to take Section 241 out of the general savings clause. The fact that Section 241 (d) is to apply except as otherwise provided in

the *section* (not the *Act*), coupled with the fact that the section does otherwise provide by the simple use of the word "hereafter" as to some matters, is further evidence that Section 241 alone governs issues of retroactivity with relation to deportation. The decisions discussed in our brief in No. 435, pp. 12-13, 15-16, show that no particular phrasing, no magic formula, is necessary to take a particular section out of the savings clause. *Shomberg v. United States*, 348 U. S. 540. Moreover, in *Marcello v. Bonds*, 349 U. S. 302, this Court at least assumed the retrospective effect of Section 241 (d) in holding, after an argument with respect to the savings clause had been made to it, that Section 241, when applied retrospectively to a pre-1952 narcotics offense, did not constitute a constitutionally prohibited *ex post facto* law. And lower federal courts have recognized Section 241 (d) as a clause specifically intended to give retrospective effect to grounds for deportation set forth in Section 241. See, e. g., *Pino v. Nicolls*, 215 F. 2d 237, 246 (C. A. 1), reversed on other grounds, *sub nom. Marcello v. Bonds*, 349 U. S. 302.

B. *The legislative history relating to stowaways and former convictions confirms the congressional purpose to apply the specific grounds of deportation to conduct occurring prior to the 1952 Act*

We have discussed in our brief in No. 435 the general legislative history which confirms the congressional intent, apparent from the language of the statute, that (except in a few instances clearly indicated by the language) the grounds for deportation set forth in Section 241 shall apply to conduct occurring prior to the 1952 Act. Here we show, with rela-

tion to the problems involved in this case, and particularly with relation to stowaways who under the 1917 Act could be deported only within five years after entry, that the retrospective nature of the 1952 enactment was plainly called to the attention of Congress, and that the decision of Congress to keep the present language can be interpreted only as a deliberate congressional determination of policy.

1. With respect to stowaways, Congress evidenced a sharp hostility, as well as an acute awareness of the need for a new approach to the continuing problem. The elimination of the previous five-year restriction on the deportation of stowaways does not stand alone but is consistent with other language of the reports contemplating the elimination of the former discretionary power to admit stowaways (S. Rep. No. 1137, 82d Cong., 2d Sess., 10), the elimination of some of the procedure formerly protecting stowaways (*id.*, 27), and the stiffening of requirements for administrative relief. The Senate committee stated (*id.*, 25):

* * * The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally * * * with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota

numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. * * *

Earlier, the basic congressional study of the immigration laws, S. Rep. No. 1515, 81st Cong., 2d Sess., had recommended, (p. 389):

Under section 19 of the 1917 act, any alien who, at the time of entry, was a member of one or more of the classes of aliens excluded from admission to the United States may be deported at any time within 5 years after entry. It is the recommendation of the subcommittee that the time limitation on their deportation after entry should be eliminated. If the cause for exclusion existed at the time of entry, it is believed that *such aliens are just as undesirable at any subsequent time as they are within the 5 years after entry.* [Emphasis added.]

The committees of both the Senate and House acknowledged consideration of analyses of drafts of the Act (S. 3455, 81st Cong., 2d Sess., and S. 716, 82d Cong., 1st Sess.) by the Immigration and Naturalization Service (S. Rep. No. 1137, 82d Cong., 2d Sess., 3; H. Rep. No. 1365, 82d Cong., 2d Sess., 27-28).^{*} In discussing Section 241 (a) (1), applicable to stowaways, the analysis of S. 716 states, "It will be noted that no statute of limitations is applicable to any ground of deportation under section 241 [(a) (1)]" (p. 241-1). This must be read in connection

^{*} Copies of these analyses have been lodged with the Librarian of this Court for use in connection with this case and *Mulcahey v. Catalanotte*, (this Term, No. 435).

with the general comment on what is now 241 (d) (pp. 241-15, 16), namely:

This subsection makes aliens who fall within any of the classes enumerated in subsections (a) or (c) deportable without regard to the fact that the alien entered the United States before the enactment of this Act or that the facts which make him deportable occurred before that time. *This of course gives retroactive effect to the deportation provisions of this bill.* * * * [Emphasis added.]

It is thus evident that Congress was informed that the stowaway provision as written would be retrospective.

This conclusion is supported by the adoption of specific limitation provisions dealing with other matters. The conference report (H. Rep. No. 2096, 82d Cong., 2d Sess., 129) stated:

In conforming the language of both House and Senate versions regarding grounds for deportation of aliens the conferees have provided for a statute of limitations (as contained in the House version) in accord with humanitarian principles, particularly in the cases of aliens where deportation would be based on mental disease or on economic distress. * * *

As finally enacted, the Act provided a statute of limitations for mental disease (241 (a) (3)) and economic distress (241 (a) (8)), but not for stowaways (241 (a) (1)). The omission to do so cannot be viewed as other than knowing.⁵

⁵ Subsequent comment has reinforced the foregoing indications of the intent and action of the Congress to save none of the former limitations except as specifically enacted. The 1953 report of

In addition, various objections and attempts at amendment put Congress on notice that the proposed Act would not save the former period of limitation as to stowaways, either specifically or by the effect of some general savings clause. For example, in Part 2 of S. Rep. No. 1137, 82d Cong., 2d Sess., the minority of the Senate committee stated (p. 10):

* * * [S]ection 241, as it presently stands, would make any alien who failed to conform to all applicable laws when he entered the United States, no matter how innocently, forever deportable. * * *

Similarly, the veto message of the President complained that (H. Doc. No. 520, 82d Cong., 2d Sess., 6):

* * * Defects and mistakes in admission would serve to deport at any time because of the bill's elimination, retroactively as well as prospectively. If the present humane provision barring deportations on such grounds 5 years after entry. * * * [Emphasis added.]

Nevertheless, in overriding the veto, Congress made no further amendments.

2. In dealing with the second aspect of the decision below, the two-fold conviction of respondent

the President's Commission on Immigration and Nationality, *Whom We Shall Welcome*, at page 198, recognized the change:

"[T]he 1952 statute retroactively rescinded the limited statute of limitations fixed by previous law. An alien who entered the United States 25 years ago, and whose entry involved a purely technical violation, enjoyed immunity from deportation for the last 20 years. Under the 1952 Act, he is now again subject to deportation. * * *

for offenses involving moral turpitude, as to one of which a *conditional* pardon had been granted prior to enactment of the Act, it is first noteworthy that Section 241 (b) of the Act now specifically requires a "full and unconditional pardon" in order to preclude deportation, as to any particular offense. The general purpose revealed by the legislative history, to have all except specified grounds of deportation made retrospective, is applicable here as well. See *supra*, pp. 10-12.

Specifically, the Immigration Service's analysis of S. 716 (see *supra*, p. 14), in discussing Section 241 (b), relating to pardoned offenses, states in pertinent part (pp. 241-12, 13):

This subsection differs in several respects from the present provisions in section 19 (a). It will limit the pardons which can be effective in preventing deportation to those granted by the President or any Governor. A legislative pardon will no longer be effective. The statute states specifically that the pardon must be full and unconditional. The changed language also removes any possible doubt that foreign pardons are not to be effective in preventing deportation.

This comment, too, must be considered with the comment (quoted *supra*, p. 15), on the retrospective effect of other principal grounds of deportation.

Here too, therefore, Congress was put on notice that former deportation defenses (except where expressly continued in Section 241) would no longer be effective under the new Act.

Moreover, Section 19 of the Act of February 5, 1917, 39 Stat. 874, 889, 8 U. S. C. (1946 ed.) 155 (a), the predecessor of the present Section 241 (a) (4), had provided for the deportation of any alien "who is *hereafter* sentenced more than once" (emphasis added). The fact that in 1952 Congress dropped the word "hereafter" demonstrates its specific purpose to apply Section 241 to antecedent convictions as well as convictions subsequent to the Act. Underlying this purpose was undoubtedly the desire on the part of many in Congress to facilitate the deportation of alien criminals. See H. Rep. No. 1365, 82d Cong., 2d Sess., 28 (House Committee on the Judiciary); S. Rep. No. 307, 82d Cong., 1st Sess., 15 (Special Senate Committee to Investigate Organized Crime in Interstate Commerce). See also *Pino v. Nicolls*, 215 F. 2d 237, 246 (C₉ A. 1), reversed on other grounds, *sub. nom. Marcello v. Bonds*, 349 U. S. 302 (holding that Section 241 (a) (4) was intended to have retrospective application).

In sum, even apart from the face of the Act, its legislative history shows that Congress, with full knowledge of the implications of its action, adopted new legislation having the effect of rendering subject to deportation aliens in respondent's circumstances, notwithstanding the fact that such aliens had not been deportable under prior legislation. Conversely, there is nothing in the legislative history to show that Congress, by means of the savings clause, sought to erect an absolute bar to deportation of such aliens for their prior conduct.

II

RESPONDENT HAD NO "STATUS" OF NONDEPORTABILITY WHICH WOULD BE PRESERVED UNDER THE SAVINGS CLAUSE OF THE 1952 ACT

In No. 435, this Term, we argue that, quite aside from the overriding effect of Section 241 (d), mere inaction by Congress in failing earlier to make a narcotics conviction a separate ground for deportation did not result in any "status" which would be preserved by the general savings clause. We do not here reargue the general principles there discussed.

The facts of this case present somewhat more of a basis for the position that respondent had a status of nondeportability since, as to each of the two matters for which he is now being deported, his former nondeportability resulted from the happening of a certain event which under the earlier legislation precluded deportation for the matter in question (*i. e.*, running of the five-year period as to the entry as a stowaway, and the conditional pardon as to one of the two crimes). Nevertheless, we do not believe that, even in this context, nondeportability can be said to be a status as that term is used in the savings clause.

It is true of the facts here, as it is of mere non-action, that Congress has never accorded or offered an affirmative privilege, such as a general amnesty, with respect to illegal entry or criminal offenses. This Court has repeatedly held that the alien derives nothing from the fact that Congress has not heretofore chosen to attach the consequence of deportability to the alien's particular offenses or conduct; Congress can act, and act retrospectively, at a later time.

Galvan v. Press, 347 U. S. 522, 531; *Harisiades v. Shaughnessy*, 342 U. S. 580, 595; *Eichenlaub v. Shaughnessy*, 338 U. S. 521, 529; *Mahler v. Eby*, 264 U. S. 32, 39-40; *Ng Fung Ho v. White*, 259 U. S. 276, 280-281; *Marcello v. Bonds*, 349 U. S. 302. This absence of action by the Congress cannot, as a matter of statutory language, be treated as a "status, condition, right in process of acquisition," or as an "act, thing, liability, obligation, or matter, civil or criminal."

A statute of limitation does not convert an unlawful residence into a lawful one. *United States ex rel. Stapf v. Corsi*, 287 U. S. 129, 133. The running of a statute of limitations does not confer vested rights. *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314; *Pittsburgh Can Co. v. United States*, 113 F. 2d 821, 824 (C. A. 3); *United States v. Obermeier*, 186 F. 2d 243, 254-255 (C. A. 2), certiorari denied, 340 U. S. 951. Moreover, a change as to a matter of remedy is generally construed as immediately applicable. *Bruner v. United States*, 343 U. S. 112, 116-117; *Ex parte Collett*, 337 U. S. 55, 71. Hence, the fact that Congress, perhaps for administrative and practical reasons, had earlier refrained from requiring immigration authorities to pursue some illegal entries too far into the past did not affirmatively bestow a status or right upon an illegal entrant.

Similarly, the fact that the former statute was construed to be inapplicable to crimes conditionally pardoned does not mean that an alien remains non-deportable for his pre-1952 offenses when Congress specifically added language to the contrary. And while the earlier deportation proceedings against re-

spondent had been terminated upon the basis of a conditional pardon (granted after the proceedings had been instituted), the doctrine of *res judicata* does not apply even in the case of a much more specific administrative determination. *Pearson v. Williams*, 202 U. S. 281; *Bridges v. United States*, 199 F. 2d 811, 826 (C. A. 9), reversed on other grounds, 346 U. S. 209.

Nothing in the legislative history of the Act nor in the language of the savings clause indicates that any "vested right" was to be accorded by the savings clause to an alien who had entered the country illegally and had thereafter committed two crimes involving moral turpitude. As we have shown in our brief in No. 435 (pp. 21-22, 25-26), the addition of the terms "status," "condition," and "right in process of acquisition" in the savings clause was intended to resolve a conflict of decisions on a minor's derivation of citizenship through parental naturalization. The statutory defenses which barred respondent's deportation under pre-1952 legislation have no similar character as affirmative grants of a privilege.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1956

JOHN M. LEHMANN, OFFICER IN CHARGE, PETITIONER

UNITED STATES OF AMERICA, EX REL. BRUNO CARSON
OR BRUNO CARASANTI

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

	Page
I. The issues raised in petitioner's brief are properly before the Court.....	1
II. Section 241 contains specific retroactive provisions making the conduct here involved subject to present deportation.....	2
A. Respondent concedes, as he must, that section 241 contains retroactive provisions.....	2
B. The savings clause affects only matters not covered by other specific provisions; its effect is not to override all other sections of the Act unless they are expressly stated, in terms, to be exceptions to that clause.....	3
C. The legislative history of the savings clause demonstrates that it was not intended to defeat the deportation provisions of section 241.....	6
D. The construction of section 241 urged by respondent is strained, contrary to its plain purpose, and would make some of its provisions meaningless.....	8
III. Respondent fails to show that one in his position was considered to have the kind of "status" protected by the savings clause.....	12
Appendix.....	A-1

CITATIONS

Cases:

	Page
<i>Galvan v. Press</i> , 347 U. S. 522.....	4
<i>Harisiades v. Shaughnessy</i> , 342 U. S. 580.....	4
<i>Shomberg v. United States</i> , 348 U. S. 540.....	5

Statutes:

Alien Registration Act of 1940, 54 Stat. 670.....	4, 8
Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101, <i>et seq.</i>	
Section 241.....	2, 3, 6, 7, 8, 9, 11, 12, A-1
Section 241 (a) (1).....	5, A-1
Section 241 (a) (4).....	5, A-1
Section 241 (a) (11).....	9, A-5
Section 241 (a) (17).....	9, 10, A-6
Section 241 (d).....	5, 6, 7, 8, 11, 12, A-9
Section 405 (a).....	3, 5, 6, 8
Internal Security Act of 1950, 64 Stat. 987.....	4, 8
1 U. S. C. 109.....	7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 72

JOHN M. LEHMANN, OFFICER IN CHARGE, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. BRUNO CARSON
OR BRUNO CARASANITI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I. THE ISSUES RAISED IN PETITIONER'S BRIEF ARE PROPERLY BEFORE THE COURT

As his first point respondent argues that the question of whether he had a "status" within the meaning of the savings clause was not raised below nor in the petition for certiorari. We submit that the issue of the applicability of the savings clause to one in respondent's position was implicit in the conflicting decisions below. It was specifically raised in the petition for certiorari. The sole question there raised was:

Whether respondent * * * had a "status" of non-deportability which was preserved to him by the savings clause of the 1952 Act despite

(17)

the fact that Section 241 (d) of that Act expressly makes retroactive the grounds for deportation specified in the Act. [Pet. p. 2]

II. SECTION 241 CONTAINS SPECIFIC RETROACTIVE PROVISIONS MAKING THE CONDUCT HERE INVOLVED SUBJECT TO PRESENT DEPORTATION

A. RESPONDENT CONCEDES, AS HE MUST, THAT SECTION 241 CONTAINS RETROACTIVE PROVISIONS

Section 241 of the Immigration and Nationality Act of 1952 contains the grounds which make persons subject to deportation. The section is nine pages long covering all of the specific grounds for deportation. As to each ground, the language of the statute indicates whether it is to be prospective only or whether conduct prior to the 1952 Act is to be a ground for deportation. For the convenience of the Court the entire section has been reprinted as an Appendix to this reply brief (*infra*, pp. A-1-A-9). In each provision the words relating to the time at which the conduct or offense must occur have been put in bold face. It will be seen that in the various specific provisions substantial attention must have been devoted to the problem of timing. For example, within subsection (11) (*infra*, p. A-5), under which respondent Catalanno in the companion case, No. 435, has been ordered deported, a distinction is made between narcotic addicts and those convicted of traffic in narcotics. An alien who "*hereafter at any time after entry* has been" an addict is to be deported, whereas for narcotics convictions the deportation requirement covers an alien who has been convicted "*at any time*".

Faced with this clear and specific language, respondent has conceded that the section is retroactive:

We admit as did the Court below (R. 30) that some provisions of section 241 are retroactive and that others are not. Where prospective application of section 241 was desired, the word "hereafter" was used. [Resp. Br. p. 28.]

-Since most provisions of section 241 are concededly retroactive and since they explicitly make the conduct involved in these cases grounds for present deportation, the first question before the Court is a narrow one: As between the specific provisions of section 241 and the general language of the savings clause in section 405 (a), which controls? Or, put in another way, is the retroactive effect which is specifically and concededly provided in section 241 "specifically provided therein" within the meaning of section 405 (a)? We submit that the Court should resolve this issue in favor of section 241 whichever way the question is stated.

B. THE SAVINGS CLAUSE AFFECTS MATTERS ONLY NOT COVERED BY OTHER SPECIFIC PROVISIONS; ITS EFFECT IS NOT TO OVERRIDE ALL OTHER SECTIONS OF THE ACT UNLESS THEY ARE EXPRESSLY STATED, IN TERMS, TO BE EXCEPTIONS TO THAT CLAUSE

From respondent's brief one might conclude that the preservation of the status quo was the most important consideration in the adoption of the Immigration and Nationality Act—that the position of all aliens then within the United States was to be unaffected by the adoption of the Act. Respondent argues that, notwithstanding the explicit retroactive

language of the Act, no alien was made subject to deportation who was not already subject to deportation. This effect, he contends, flows from section 405. Such a construction of the savings clause is wholly unwarranted.

Respondent's suggested construction would make the 1952 Act completely out of step with its predecessors. Both the Alien Registration Act of 1940, 54 Stat. 670, 673, and the Internal Security Act of 1950, 64 Stat. 987, 1008, were effectively made retroactive so that persons not theretofore deportable became deportable for conduct which occurred prior to the adoption of those acts. The retroactive aspect of the 1940 statute was litigated in *Harisiades v. Shaughnessy*, 342 U. S. 580, and that of the 1950 Act in *Galvan v. Press*, 347 U. S. 522. The retroactive wording used in the 1952 Act is even more explicit than the "unmistakable language" of the 1940 Act referred to by Mr. Justice Jackson. 342 U. S. at 593. Yet respondent asks that the 1952 Act be construed as not affecting the deportability of any alien then in the United States. Such a departure from the earlier pattern is out of keeping with the known Congressional attitude and purpose when the 1952 Act was passed.

Respondent seeks to construe the savings clause as overriding all provisions of the Act which do not expressly state, in terms, that they are not to be governed by that clause. Such a construction of the savings clause is contrary to its plain meaning, contrary to the way the phrase "specifically provided" is used in the Act, and would make a rigid formula override obvious Congressional intent.

Section 405 (a) states the policy that is to apply to those matters as to which there is no inconsistent specific provision in the Act. In order not to be governed by the savings clause it is only necessary that there be a specific provision. There need not be a stated exception.

Assuming, for the sake of argument, that respondent had a "status" within the meaning of section 405 (a), he would remain non-deportable under that clause unless there were a specific provision making him deportable, *i. e.*, unless it was specifically provided otherwise. But in this case there is a specific provision, in fact two—Section 241 (a) (1) and section 241 (a) (4), which specifically provide that persons who in the past have done what respondent has done are now to be deported. The phrase "otherwise specifically provided" as used in section 405 (a) means that the broad and general policy of the savings clause is to apply unless there are conflicting specific provisions. It does not demand, as respondent would have it, that there be "a specific provision stating that the prior law is not continued in force and effect." (Resp. Br. p. 34). Any such rigid requirement of "magic passwords" is inconsistent with the basic search for legislative intent and contrary to the explicit and unanimous holding of this Court in *Shomberg v. United States*, 348 U. S. 540.

Section 241 (d) provides for the retroactive effect here under discussion—

Except as otherwise specifically provided in this section * * *

Within section 241 the exceptions are specifically provided by the use of the word "hereafter". There is no statement that certain subsections or offenses are not to be governed by section 241 (d). There is no such language as "notwithstanding the provisions of section 241 (d)". Respondent apparently agrees that within section 241 the word "hereafter" is enough to make something "otherwise specifically provided" so as to take it out of section 241 (d). (Resp. Br. p. 28). He does not attempt to explain why in his view the phrase "otherwise specifically provided" demands so much more when it appears in section 405 (a).

C. THE LEGISLATIVE HISTORY OF THE SAVINGS CLAUSE
DEMONSTRATES THAT IT WAS NOT INTENDED TO DEFEAT THE DEPORTATION PROVISIONS OF SECTION 241

1. Respondent points out that the savings clause began its legislative career in the 1952 Act in Title III where it applied only to naturalization proceedings. The words "status and condition" were inserted at this stage. (Resp. Br. p. 14.) It is thus clear that any specific intent as to the meaning of those words related to naturalization, not to deportation. The origin of the savings clause as a part of the naturalization provisions also explains why it is only in the naturalization sections of the 1952 Act that there are stated exceptions to the savings clause, and then only to section 405 (b) dealing with naturalization petitions.

At this stage (S. 3455) section 241 contained the grounds for deportation here involved and section "241 (d) was there set forth as in the final version of the law." (Resp. Br. p. 14). If the bill had been

adopted as then drafted there would be no question but that respondent would be deportable since the savings clause was not then applicable to the deportation provisions. Respondent's argument is that the shift in location of the savings clause completely changed the effect of section 241. It is submitted that no such conclusion can be drawn from the change in location of the savings clause or from the failure to insert at this stage a cross reference in section 241 to section 405 (a). (See Resp. Br. p. 30). Most of the subsections in section 241 then contained the specific provisions as to time of offense now enacted. Others, such as subsection (11), which then said "has been convicted" of a narcotic offense, were amended by inserting the phrase "at any time". And, at the time when the savings clause was made applicable to deportation provisions, section 241 (d) was retained.

2. We do not agree with respondent's explanation of the purpose and effect of section 241 (d). Respondent states that the repeal of prior laws would have rendered previously deportable aliens immune and that accordingly, "to cover deportable aliens under pre-existing law, it was necessary to provide in section 241 (d) that the grounds of deportation be retroactive." (Resp. Br. p. 14). This explanation seems wrong on many counts.

First, the general savings statute, 1 U. S. C. 109, would appear to prevent any immunity by virtue of repeal of prior laws unless the new act should so expressly provide. Second, section 241 (d) was not drafted in a way which would carry forward prior liability for deportation. It was explicitly drafted so that the new, and broader, grounds would apply to

factual situations that had occurred earlier. Third, when the savings clause of section 405 (a) was made applicable to deportation proceedings, section 241 (d) was retained. If it was solely designed to make persons currently deportable who were deportable already this was accomplished, under respondent's view, by the savings clause and 241 (d) could have been struck.

3. The purpose of section 241 (d) is more correctly understood if it is compared with its ancestor in the 1940 Alien Registration Act, 54 Stat. 673, and in the Internal Security Act of 1950, 64 Stat. 1008, each of which read:

The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

This clause was inserted in those acts to make new grounds of deportation retroactive. Section 241 (d), based upon them, was for the same purpose.

The legislative history demonstrates that section 241 was retroactive as to new grounds for deportation and originally was not subject to the savings clause. There is no indication that the moving of the savings clause to the end of the Act was intended to defeat the designed effect of section 241.

D. THE CONSTRUCTION OF SECTION 241 URGED BY RESPONDENT IS STRAINED, CONTRARY TO ITS PLAIN PURPOSE, AND WOULD MAKE SOME OF ITS PROVISIONS MEANINGLESS

Respondent asks the Court to hold that section 241 does not contain "specific" provisions within the mean-

ing of the savings clause, and that the savings clause preserves for any alien who could not be deported prior to its adoption a status of non-deportability. Should the statute be construed in this manner it would mean that all the careful drafting as to tenses in section 241 (see Appendix, *infra*) was meaningless. Congress might as well have begun each section with "hereafter", for the new provisions would only have prospective effect. No new language would make an alien deportable for past conduct since, under respondent's view, a status of non-deportability was to be continued. There would be no need to refer to prior offenses which were already a ground for deportation since, under respondent's view, a status of deportability would also be continued. In short, the entire retroactive nature of section 241—conceded by respondent—would be in name only, since the provisions would only have prospective effect.

But it is plain on the face of the statute that Congress intended to have aliens who were not then deportable deported for prior conduct. Such an intent would be completely frustrated by construing the savings clause as asked by respondent. That Congress wanted deported any alien who had ever been convicted of traffic in narcotics is clear from subsection (11) (*infra*, p. A-5). One other example of how respondent's construction of the Act would make provisions meaningless may be pointed out.

Under subsection 17 (*infra*, pp. A-6-A-7) an alien is made deportable if the Attorney General finds him to be an undesirable resident by reason of a conviction for violating the Selective Training and Serv-

ice Act of 1940, an act which was no longer in effect five years prior to the adoption of the Immigration and Nationality Act. Violations of the 1940 Act (which must have occurred prior to 1947) were not a ground for deportation prior to 1952. Respondent's construction of the Act would make this provision a nullity. Any alien who had violated the Selective Training and Service Act of 1940 would, under respondent's theory, have a status of non-deportability which would be saved by the Act; despite the explicit provision of section 241 (a) (17) no alien could be deported for violating the 1940 Act.

Respondent urges that the Court must adopt his construction of the Act or else the Immigration Service will be required to re-examine thousands of cases of aliens who have had their status adjusted, who have been granted suspension of deportation, or who have had private bills passed in their behalf. There is no merit in this contention. No one has suggested that the private bills were repealed by implication; they certainly were not done so expressly. No one has suggested that Congress intended to upset suspension cases which, as respondent points out, "it had approved itself." (Resp. Br. p. 26.) Where an alien has had his status adjusted, the original entry is made legal or he has a subsequent legal entry. This Act, like its predecessors, has never been construed to require deportation under such circumstances.

Respondent appears to argue that there is no freedom to construe a statute reasonably. We submit

that the most reasonable construction of section 241, taken together with the savings clause, is that Congress intended certain categories of aliens to become deportable by virtue of this Act—that the provisions as to retroactivity had some meaning—and that at the same time Congress did not intend to open up all cases where an alien's status had been altered by legislative or administrative action. The statute does not require respondent's rigid insistence on one extreme or the other.

The subsections of section 241 provide the various times at which the conduct occurs which makes an alien subject to deportation. These subsections themselves determine whether the ground is prospective or retrospective. Section 241 (d) (*infra*, p. A-9) provides that aliens shall fall within these classes notwithstanding the date of entry and notwithstanding the time at which the relevant facts occur. Under these specific provisions the alien is not to be benefited by the fact that the events occurred at a time when the law was different rather than at the present time. There is no provision in section 241 that it shall be applicable to an alien falling within the enumerated classes notwithstanding an adjustment of status, a suspension of deportation, or a private bill—and we read none into it.

The retroactive nature of section 241 does not wipe out events that have occurred, it merely requires that they be judged by present law. The facts by reason of which one is deportable or nondeportable are to be judged by the new law, rather than the old. In the

terms of section 241 (d) the new provisions are to be applicable "notwithstanding * * * that the facts * * * occurred prior to the date of enactment of this Act." The new law is applied to *all* the facts relating to *an* alien's deportability, not just the crimes or offenses.

Applying the statute to the cases suggested by respondent his fears are seen to be unfounded. A person who had a suspension of deportation under the old law was not deportable. If such a suspension had occurred after the passage of the new Act he would still be not deportable. The same is true for private bills and adjustments of status, as to legality of entry or permanency of residence. If they had occurred after the passage of the new law (as they must be judged under section 241 (d)) the alien would still be nondeportable.

We apply the same standard to respondent's case. If the conditional pardon had occurred after the passage of the Act it would not protect him from deportation; therefore his deportation is required. If the passage of five years after illegal entry is judged by the new law it, too, is not enough to bar deportation. The retroactive nature of section 241 only requires that prior facts be judged by the new law, it does not wipe out reasons for not being deported which were valid under the old law and which remain valid under the new law.

III. RESPONDENT FAILS TO SHOW THAT ONE IN HIS POSITION WAS CONSIDERED TO HAVE THE KIND OF "STATUS" PROTECTED BY THE SAVINGS CLAUSE

Should the Court agree that section 241 specifically provided for the deportation of persons in respond-

ent's position, there is no need to consider whether respondent had a "status" within the meaning of the savings clause, section 405 (a) of the 1952 Act. Obviously, as respondent points out, the word "status" can be used to describe any position or condition or lack of it. The question here is whether an alien illegally in this country but not at the time subject to deportation had the kind of rights intended to be carried forward under section 405 (a), except where there were specific provisions to the contrary. Respondent fails to show any evidence that section 405 (a) was intended to apply to persons in that circumstance. He does show that the word "status" was originally inserted in the Act to refer to naturalization provisions, not deportation. (Resp. Br. p. 14). By referring to suspensions of deportation, adjustment of status, and private bills, respondent also shows the sort of rights that were clearly included within the savings clause. The contrast between the position of such aliens and respondent demonstrates as much as anything else respondent's lack of "status". (See Pet. Br. pp. 19-21.)

Respondent's concept that the right to continue an illegal residence without being deported is a "status" goes too far. Under the same theory any alien, not deportable under the old law, could claim that the standards of that law must be applied even as to future offenses. If now being charged with offenses made deportable under the new Act he would claim that under the old law he had the right to do those things without being deported—a valuable right or

status preserved to him by the savings clause. And aliens abroad could even claim the preservation of a status of admissibility.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

ROGER FISHER,
Assistant to the Solicitor General.

MARCH 1957.

APPENDIX

SECTION 241 OF THE IMMIGRATION AND NATIONALITY ACT OF 1952, 66 STAT. 204-208

WORDS RELATING TO THE TIME AT WHICH THE REASON
FOR DEPORTATION OCCURRED HAVE BEEN PUT IN BOLD-
FACE TYPE

General classes of deportable aliens

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) **at the time of entry** was within one or more of the classes of aliens excludable by the law **existing at the time of such entry**;

(2) **entered** the United States without inspection or at any time or place other than as designated by the Attorney General or **is** in the United States in violation of this Act or in violation of any other law of the United States;

(3) **hereafter, within five years after entry, becomes** institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;

(4) **is convicted** of a crime involving moral turpitude **committed within five years after entry** and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or **who at any time after entry is convicted** of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) **has failed** to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or **has been convicted** under section 266 (e) of this title, or under section 36 (c) of the Alien Registration Act, 1940, or **has been convicted** of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or **has been convicted** under section 1546 of title 18 of the United States Code;

(6) **is or at any time has been, after entry,** a member of any of the following classes of aliens:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by

force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their

official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (G);

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a), unless the Attorney General is satisfied, in the case of any alien within cate-

gory (C) of paragraph (29) of such section, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a non-signatory transportation company under section 238 (a) and was without the required period of stay in such foreign contiguous territory or adjacent islands following such arrival (other than an alien who is a native-born citizen of any of the countries enumerated in section 101 (a) (27) (C) and an alien described in section 101 (a) (27) (B));

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding,

transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212 (a); or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amend-

ment thereto, the judgment on such conviction having become final, namely: an Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", approved June 15, 1917, or the amendment thereof approved May 16, 1918; sections 791, 792, 793, 794, 2388, and 3241, title 18, United States Code; an Act entitled "An Act to prohibit the manufacture, distribution, storage, use, and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use, and possession of the same; and for other purposes", approved October 6, 1917; an Act entitled "An Act to prevent in time of war departure from and entry into the United States contrary to the public safety", approved May 22, 1918; section 215 of this Act; an Act entitled "An Act to punish the willful injury or destruction of war material or of war premises or utilities used in connection with war material, and for other purposes", approved April 20, 1918; sections 2151, 2153, 2154, 2155, and 2156 of title 18, United States Code; an Act entitled "An Act to authorize the President to increase temporarily the Military establishment of the United States", approved May 18, 1917, or any amendment thereof or supplement thereto; the Selective Training and Service Act of 1940; the Selective Service Act of 1948; the Universal Military Training and Service Act; an Act entitled "An Act to punish persons who make threats against the President of the United States", approved February 14, 1917; section 871 of title 18, United States Code; an Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes", approved October 6, 1917, or any amendment thereof; the Trading With

the Enemy Act; section 6 of the Penal Code of the United States; section 2384 of title 18, United States Code; **has been convicted of any offense** against section 13 of the Penal Code of the United States **committed during the period of August 1, 1914, to April 6, 1917, or of a conspiracy occurring within said period to commit an offense under said section 13 or of any offense committed during said period** against the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, in aid of a belligerent in the European war; section 960 of title 18, United States Code; or

(18) **has been convicted** under section 278 of this Act or under section 4 of the Immigration Act of February 5, 1917.

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 212 (a), and to be in the United States in violation of this Act within the meaning of subsection (a) (2) of this section, if

(1) hereafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into ~~less than two years~~ prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

(e) An alien, admitted as a nonimmigrant under the provisions of either section 101 (a) (15) (A) (i) or 101 (a) (15) (G) (i), and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under subsection (a) (6) or (7) of this section.

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FILED

JUN 21 1956

WILLIAM E. WILSON, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. [REDACTED] 72

JOHN M. LEHMANN,

Officer in Charge,

Petitioner,

vs.

UNITED STATES OF AMERICA, ex rel. BRUNO CARSON
or BRUNO CARASANTIL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION.

HENRY C. LAVINE,

Williamson Bldg., Cleveland, Ohio,

Attorney for Respondent.

TABLE OF CONTENTS.

Opinions Below -----	1
Jurisdiction -----	1
Question Presented -----	2
Statutes Involved -----	2
Statement -----	4
Reasons for Denying the Writ -----	6
Conclusion -----	14

TABLE OF AUTHORITIES.

Cases.

(C-----; Matter of, Interim Decision No. 739 (Board of Immigration Appeals, Sept. 1, 1955) -----	13
<i>Evans vs. Murff</i> , 135 F. Supp. 907 (D. Md.) -----	8
<i>Gagliano vs. Bonds</i> , 222 F. 2d 958 (C. A. 5) -----	6, 7
<i>Marcello vs. Bonds</i> , 349 U. S. 302 -----	6, 7
<i>Pino vs. Landon</i> , 349 U. S. 901 -----	6
<i>Robles-Rubio, Ex Parte</i> , 119 F. Supp. 610 (N.D. Cal.) -----	8, 9, 13
<i>Shomberg vs. United States</i> , 348 U. S. 540 -----	9, 12, 14
<i>U. S. vs. Menasche</i> , 348 U. S. 528 -----	8, 9, 11, 12, 14
<i>United States ex rel. De Luca vs. O'Rourke</i> , 213 F. 2d 758 (C. A. 8) -----	8, 9, 13
<i>U. S. ex rel. Sciria vs. Lehmann</i> , 136 F. Supp. 458 (N. D. Ohio) -----	5, 8, 13

Statutes.

Immigration Act of Feb. 5, 1917, Sec. 19	4
Nationality Act of June 27, 1952:	
Sec. 241(a) (1) (8 U. S. C. 1251(a) (1))	2
Sec. 241(a) (4) (8 U. S. C. 1251(a) (4))	2, 7
Sec. 241(b) (8 U. S. C. 1251(b))	3
Sec. 241(d) (8 U. S. C. 1251(d))	3, 7, 10
Sec. 311 (8 U. S. C. 1422)	10
Sec. 313(a) (8 U. S. C. 1424(a))	10
Sec. 315(a) (8 U. S. C. 1426(a))	10
Sec. 318 (8 U. S. C. 1429)	10
Sec. 331(d) (8 U. S. C. 1442(d))	10
Sec. 405(a) (8 U. S. C. 1101 note)	3, 8, 10
45 Stat. 1512	12
28 U. S. 1254(1)	1

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 908.

JOHN M. LEHMANN,
Officer in Charge,
Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* BRUNO CARSON
or BRUNO CARASANITI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 228 F. 2d 142 (R. 21-32) and the findings of the District Court are unreported (R. 49-50).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 17, 1955, and on January 30, 1956 a petition for rehearing was denied. The petition for certiorari herein was filed on April 27, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

1. Whether an alien who entered the United States as a stowaway in 1919 and who was not deportable under the prior immigration law, became deportable under the provisions of the 1952 Immigration and Nationality Act.

2. Whether an alien who was not deportable under prior immigration law because he had been conditionally pardoned of a criminal conviction, became deportable under the provisions of the 1952 Immigration and Nationality Act.

STATUTES INVOLVED.

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

"Section 241 (a) (1), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (1):

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Section 241 (a) (4), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251 (a) (4):

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether

confined therefor and regardless of whether the convictions were in a single trial;

Section 241 (b), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (b):

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter; a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Section 241 (d), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1251 (d):

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 405(a), 66 Stat. 208, 8 U. S. C. (1952 ed.) 1101 note:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or

warrant of deportation, order of exclusion, or other document or proceeding, which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

"SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * * Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned. * * *"

STATEMENT.

Respondent is a 53 year old native of Italy who came here in 1919 as a stowaway (R. 103). He is married to a native-born citizen of the United States and is the father of four American-born children, the youngest of whom are aged 12 and 10 years. Respondent has been a carpenter and builder for several years and his present good character is undisputed.

In 1941 deportation proceedings were instituted against respondent based solely upon two convictions in 1936. These proceedings were cancelled in 1945 when Governor Lausche, of Ohio, granted respondent a pardon for one of his offenses conditioned upon his conducting himself thereafter as a law abiding person. This pardon indisputably granted respondent immunity from deportation under the law then in effect.

More than eight years later, in 1953, deportation proceedings were instituted anew against respondent under the 1952 Immigration and Nationality Act, although he had been law-abiding and of good character during the intervening period. An order of deportation was entered in 1954 upon the ground that respondent was deportable for entry into the United States as a stowaway in 1919 and because of his two convictions in 1936. The pardon was refused recognition on the theory that it was not a full and unconditional pardon as required by the new law.

Respondent filed a writ of habeas corpus which was dismissed by the District Court. It should be observed, however, that the same District Judge subsequently held in *U. S. ex rel. Sciria vs. Lehmann*, 136 F. Supp. 458 (N.D. Ohio) that an alien in the respondent's situation was not subject to deportation, and there stated that his conclusion in this Carson case had been in error.

The Court of Appeals reversed the dismissal of the writ and held that respondent had a non-deportable status under prior legislation which was preserved by the savings clause of the 1952 Act.

REASONS FOR DENYING THE WRIT.

1. The Government's effort to wring a conflict (Pet., p. 3) out of the decision below and the decisions in *Marcello vs. Bonds*, 349 U. S. 302, *Gagliano vs. Bonds*, 222 F. 2d 958 (C. A. 5) and *Pino vs. Landon*, 349 U. S. 901, is both strained and futile.

With respect to the *Marcello* case, the Government concedes, as it must, that "this Court did not expressly pass upon the savings clause issue" (Pet. pp. 11-12). It admits, as it must, that *Marcello* belatedly sought to raise the savings clause issue in a supplemental petition for certiorari, which was denied (Pet., p. 11). Thus, the Government is forced to qualify its argument respecting *Marcello*, by referring to the "implications of the ruling" (Pet., p. 10), and what that decision "implicitly" held (Pet., p. 12).

Traditionally, this Court does not decide or foreclose issues not presented to it or in the Courts below. The present issue was not raised in *Marcello* in the lower courts. That this issue was not before this Court was acknowledged by the Government in its *Marcello* brief (p. 41, footnote 8). *Marcello*'s untimely effort to bring this issue before this Court in a supplemental petition for certiorari, was denied, 348 U. S. 805. This Court's decision in the *Marcello* case makes no mention of the relationship between the savings clause and the deportation provisions here involved. There is plainly no conflict between the decision below and *Marcello*.

The Fifth Circuit's per curiam decision in *Gagliano vs. Bonds*, 222 F. 2d 958, acknowledges the fact that the savings clause issue was not presented in the *Marcello* case, but concluded: "we think that issue * * *, whether formally presented and argued or not, was implicitly foreclosed by the *Marcello* decision, and, hence, is no longer

open for decision by this Court." 222 F. 2d at 959 (Emphasis added).

Just as the Government's reliance on *Marcello* is misplaced, so too is its reliance upon *Gagliano*. For, as is apparent from the portion of the decision quoted *supra*, *Gagliano* contains no reasoned conclusion; it hinges solely on a reading of *Marcello* which, as we have indicated, is incorrect.

The conflict which the Government purports to find between the decision below and the decision in *Pino v. Nicholls*, 215 F. 2d 237, *revsd. sub nom. Pino v. Landon*, 349 U. S. 901, is equally without substance. First, it should be noted that this Court reversed the decision of the First Circuit sustaining deportation, in a per curiam opinion which held that one of the convictions was not sufficiently final to support an order of deportation. Thus, the decision of the Court of Appeals in the *Pino* case, having been reversed by this Court, has limited, if any, significance.

However that may be, the First Circuit in the *Pino* case was concerned with the construction of Section 241 (a) (4) of the Immigration Act of 1952 in the limited sense of determining whether this section applied to aliens who had been convicted of crimes prior to the effective date of the 1952 Act. It noted that the word "hereafter" which had been contained in the prior law had been omitted from the 1952 provision, and concluded that the provision applied to aliens who had been convicted of crimes prior to the Act's effective date. 215 F. 2d at 246. It found reinforcement for this view by reference to Section 241(d). *Ibid.* But nowhere in its opinion did it mention or consider the application or effect of the savings clause, which is the heart of the issue in this case.

2. The decision below is in complete accord with those decisions in which the application and effect of the savings

clause has been considered in similar or analogous circumstances. See *United States ex rel. De Luca vs. O'Rourke*, 213 F. 2d 758 (C. A. 8); *Ex Parte Robles-Rubio*, 119 F. Supp. 610 (N. D. Cal.); see also *U. S. ex rel. Sciria vs. Lehmann*, 136 F. Supp. 458 (N. D. Ohio).¹ In these cases it was held that aliens who had obtained a judicial recommendation against deportation, which barred their deportation under prior law, could not be deported under the new law even though the new law did not provide for judicial recommendation against deportation in their particular situations. In each instance the court based its decision on the provisions of Section 405 (a) of the Immigration Act of 1952, the savings clause which is in issue in this case.

Petitioner asserts, as one of the grounds for granting certiorari in the instant case, that the Court below, and the Eighth Circuit in the *De Luca* case, *supra*, expressed doubts as to the scope of the savings clause. Neither the Court below, nor the Eighth Circuit expressed such doubts. The decision below states that "if" the matter is not "entirely free from doubt," the result reached is consistent with the rule of statutory construction expressed by this Court in *United States v. Menasche*, 348 U. S. 528 "to give effect, if possible, to every clause and word of a statute." 228 F. 2d 147. And in *De Luca*, the Eighth Circuit concluded that:

"We feel justified in ruling that there is no clear cut authority in the Act for depriving De Luca of the status of a non-deportable alien resulting from the

¹ The Government's summary (Pet., p. 14) of the District Court decision in *Evans v. Murff*, 135 F. Supp. 907 (D. Md.) is misleading. That Court summarily dismissed the alien's claims challenging the deportation order as follows: "plaintiff did not raise the issue of deportability before the Board of Immigration Appeals, and it is too late for him to raise it now." 135 F. Supp. at 909. The decision was thereafter devoted to the refusal to grant discretionary relief.

recommendations of the sentencing judge that he be not deported." 213 F. 2d at 715.

And in *Ex Parte Robles-Rubio*, *supra*, Judge Goodman, unequivocally stated that:

"In my opinion, this provision [Section 405(a), the savings clause] was designed to meet just such a situation as is presented here." 119 F. Supp. at 614.

Significantly, the Government never sought certiorari in the *De Luca* case. Even more significantly, the Government did not even appeal from Judge Goodman's decision in *Ex Parte Robles-Rubio*. Indeed, if—as the Government asserts—the *De Luca* case reflected doubts, the Government was delinquent at that time in not seeking clarification of that decision by certiorari.² The petition for certiorari in the instant case seems to be an untimely and unseemly effort to procure a review of cases decided long ago after the time for appeal and certiorari have long expired.

3. The decision below is in complete harmony with this Court's decisions in *U. S. v. Menasche*, 348 U. S. 528 and *Shomberg v. United States*, 348 U. S. 540. As the Court of Appeals below observed, "the *Menasche* and *Shomberg* opinions thus clearly teach that the savings clause is to be interpreted as protecting the status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear." (228 F. 2d 146). In the *Shomberg* case this Court noted that Congress had es-

² Even assuming that the Eighth Circuit's decision in *De Luca* can be read as "expressing doubts," as the Government asserts, it should be noted that this decision ante-dated by almost a year the decisions of this Court, in *Menasche* and *Shomberg*, where the scope and effect of the savings clause was discussed. Whatever doubts may have existed at the time the *De Luca* case was decided, were completely and thoroughly resolved by this Court in *Shomberg* and *Menasche*.

established a statutory scheme which exempted certain provisions of the Act from the operation of the savings clause. In each case, Congress specifically provided for such exemption by the language, "notwithstanding the provisions of Section 405 of the Act." This Court listed the Sections exempted from operation of Section 405, as follows: Section 311, 66 Stat. 239, 8 U. S. C. § 1422; Section 313(a), 66 Stat. 240, 8 U. S. C. § 1424(a); Section 315(a), 66 Stat. 242, 8 U. S. C. § 1426(a); Section 318, 66 Stat. 244, 8 U. S. C. § 1429; and Section 331(d), 66 Stat. 252, 8 U. S. C. § 1442(d).³ These Sections all contain the "notwithstanding" language referred to above. This Court did not list Section 241(d) which petitioner seeks to urge is exempted from operation of Section 405. Section 241(d) makes no reference to Section 405 at all.

As noted by this Court of Appeals, below, the argument advanced by the petitioner would make the savings

³ "Section 311 provides that the right to naturalization shall not be abridged because of race, sex or marriage, and, '(n)otwithstanding section 405(b), this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this Act.' 66 Stat. 239, 8 U. S. C. § 1422, 8 U. S. C. A. § 1422.

"Section 313(a) states: 'Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized' who engages in specified subversive activities or who is a member of described subversive organizations. 66 Stat. 240, 8 U. S. C. § 1424(a), 8 U. S. C. A. § 1424(a).

"Section 315(a) provides: 'Notwithstanding the provisions of section 405(b), one who claims or has claimed his alienage and 'is or was' thereby relieved of service in the armed forces, 'shall be permanently ineligible to become a citizen.' 66 Stat. 242, 8 U. S. C. § 1426(a), 8 U. S. C. A. § 1426(a).

"Section 331(d) provides for the ending of enemy alien status and states: 'Notwithstanding the provisions of section 405(b), this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this Act and which is still pending on that date.' 66 Stat. 252, 8 U. S. C. § 1442(d), 8 U. S. C. A. § 1442(d)."

clause all but meaningless. The effect of his argument is that where there has been a specific change in the law relating to deportation, the savings clause has no application. Yet, as the Court below stated, "it is only when there has been a change that the savings clause is of any moment at all." The Court below further observed quite properly:

"On the other hand, the conclusion we have reached does no violence to the provisions of section 241(d) of the Act, 8 U. S. C. A. § 1251(d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor statutes, among them specifically the 1917 and 1924 Act. The purpose and effect of section 241(d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241(a)(1), 8 U. S. C. § 1251(a)(1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924."

The Court below also comments that the savings clause of the 1952 Immigration and Nationality Act is as broad as any enacted by Congress and that it should be given a liberal interpretation to preserve previously acquired status unless an express exemption is set forth in clear and unequivocal language. This obviously follows the views expressed by this Court in *U. S. v. Menasche*, 348 U. S. 528, 533, 535, where it was said:

"The 1952 Act made the enumeration of matters preserved by subsection (a) more complete and all-inclu-

sive by adding: 'status,' 'condition,' 'right in process of acquisition,' 'liability,' and 'obligation.' "

* * * * *

"The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provisions, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress."

In view of the statutory scheme spelled out by Congress, itself, and in view of this Court's clear ruling on the scope of the savings clause in *Menasche* and *Shomberg*, the decision below requires no further review by this Court.

4. The issue presented by respondent's entry in 1919 as a stowaway is one of narrow compass and concerns only the limited class of persons who came into this country as a stowaway, have been here over thirty years, and were never naturalized. As the Court below acknowledged, aliens arriving here after 1924 without documents remain deportable without time limitation. However, ever since 1929,⁴ Congress has indicated its concern to permit aliens in respondent's category to remain in the United States.

"* * * Congress has adhered consistently to a policy of permitting aliens who unlawfully entered the United States prior to July 1, 1924, to apply for a status of permanent residence in this country. * * * It is unreasonable to suppose that Congress would reverse its long-standing policy towards excludable aliens who entered this country prior to July 1, 1924, otherwise

⁴ 45 Stat. 1512.

than by a plain and specific declaration of its purpose to do so. Section 1251(a)(1) [Section 241] cannot be construed as expressing such intention." *U. S. ex rel. Sciria vs. Lehmann*, 136 F. Supp. 458, 461, 462 (N. D. Ohio 1955).

The foregoing makes it clear that we are not here concerned with the general application of the savings clause but rather with its specific application to the small group of aliens who had entered prior to 1924, and to whom Congress has traditionally extended special benefits. In view of this limited application and in view of the correctness of the decision below and the *Sciria* case, it is submitted that certiorari is not appropriate.

5. The issue as to respondent's deportability by reason of crimes involving moral turpitude likewise revolves around the narrow issue of the effect to be accorded pardons granted aliens prior to the 1952 Immigration and Nationality Act. This issue will not affect many aliens, nor does its solution have any more far reaching scope than the similar cases of *U. S. ex rel. DeLuca v. O'Rourke*, *supra*, where the Government declined to seek certiorari, or *Ex parte Robles-Rubio*, *supra*, where the Government did not even appeal.

The Government freely admits that "A judicial recommendation against deportation continues to bar deportation under Section 241 (b) of the 1952 Act * * *" (Pet., p. 15, note 6). Such was the holding in *U. S. ex rel. DeLuca v. O'Rourke*, *supra*. Such is the present administrative construction of the 1952 Immigration and Nationality Act. *Matter of C----*, Interim Decision No. 739 (Board of Immigration Appeals, Sept. 1, 1955).

The same principle is applicable here. The only essential difference relates to the manner in which the status of non-deportability was acquired. DeLuca acquired it by

judicial recommendation. Respondent herein acquired it by an executive pardon. If the non-deportable status of DeLuca who violated our narcotic laws is preserved by the savings clause, no logical reason exists for treating respondent's violation, pardoned by a state governor, as being in different category. On the contrary, respondent's crime has been forgiven. DeLuca's has not. A pardon should have greater, not less, efficacy than a recommendation against deportation.

The decision below correctly applies the savings clause, without differentiating capriciously between judicial recommendations and executive pardons. In this respect it is consistent with all other decided cases, and with the present administrative construction of the Act.

CONCLUSION.

In view of the restricted issues presented below, in view of the proper application by the Court below of the savings clause of the 1952 Immigration Act, and in view of this Court's recent decisions in *United States v. Menasche*, 348 U. S. 528 and *Shomberg v. United States*, 348 U. S. 540 it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

HENRY C. LAVINE,

Attorney for Respondent.

Office - Supreme Court, U.S.

FILED

MAR 22 1957

JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 72

JOHN M. LEHMANN, OFFICER IN CHARGE,

Petitioner,

v.

**UNITED STATES OF AMERICA, EX REL. BRUNO
CARSON OR BRUNO CARASANTI**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR RESPONDENT

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	6
Summary of Argument	7
I. Whether nondeportability is a status is a new issue which petitioner may not raise for the first in this Court	11
II. The 1952 savings clause, the broadest ever enacted by Congress, requires application of the 1917 Immigration Act to respondent and preserves his status thereunder	12
A. History of the 1952 Act savings clause	13
B. The 1952 savings clause is the broadest ever enacted by Congress	15
C. The savings clause requires application of existing law unless "otherwise specifically provided."	18
III. The retroactive deportation provisions of section 241 do not specifically provide an exception to the savings clause	28
A. Meaning of words "otherwise specifically provided."	28
B. Legislative history of omission of explicit exception to section 405	30
C. Statutory scheme for exemption from savings clause	30
D. Lack of specificity of section 241	34
E. Policy of preservation	37
F. Giving effect to all parts of the 1952 statute	37
G. Strict construction of deportation statutes	39
Conclusion	39
Appendix	40

CITATIONS

Cases:

	Page
<i>Bertoldi v. McGrath</i> , 178 F. 2d 977 (C.A. D.C. (1949)	17, 19, 24,
<i>Bonetti v. Brownell</i> (C.A.D.C. No. 12885, Dec. 5, 1956)	26
<i>Brewster v. Gage</i> , 280 U.S. 327 (1929)	32
<i>Crawford v. Burke</i> , 195 U.S. 176 (1904) (1951)	32 22
<i>Doremus v. Board of Education</i> , 342 U.S. 429 (1951)	22
<i>Emack v. Campbell</i> , 14 App. D.C. 186 (1899)	29
<i>Ex parte Robles-Rubio</i> , 119 F. Supp. 610 (N.D. Cal. 1954)	17
<i>Fong Haw-Tan v. Phelan</i> , 333 U.S. 10 (1947)	11, 39
<i>Ginsburg & Sons v. Popkin</i> , 285 U.S. 204 (1931)	11, 35
<i>Great Eastern Casualty Co. v. Smith</i> , 174 S.W. 687 (Tex. Civ. App., 1915)	24
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1951)	8, 22
<i>Heikkila v. Barber</i> , 345 U.S. 229 (1952)	8, 22
<i>In re Zeigler</i> , 143 N.Y.S. 562, 82 Misc. 346 (1913)	8, 21
<i>Kwong Chew v. Colding</i> , 344 U.S. 590 (1950)	8, 22
<i>Lee You Fee v. Dulles</i> , 133 F. Supp. 160, 236 F. 2d 885 (C.A. 7, 1956), pending application for certiorari, No. 643, Supreme Court	36
<i>MacEvoy v. United States</i> , 322 U.S. 102 (1943)	35
<i>Marcello v. Bonds</i> , 113 F. Supp. 22, 212 F. 2d 830 (C.A. 5, 1954), 349 U.S. 302 (1954)	10, 19, 33
<i>Matter of A.I.C., IV</i> , I&N Dec. 630	22
<i>Matter of C., V</i> , I&N Dec. 370	22
<i>Matter of DeP., I</i> , I&N Dec. 151	22
<i>Matter of S.H.C.C., IV</i> , I&N Dec. 36	22
<i>Melnick v. Melnick</i> , 147 Pa. Sup. 564, 25 A2 111 (1942)	10, 29
<i>Montclair v. Ramsdell</i> , 107 U.S. 147 (1882)	11, 37
<i>National Labor Relations Board v. Jones & Laughlin</i> , 301 U.S. 1 (1936)	11, 35, 37
<i>P. Dougherty Co. v. United States</i> , 207 F. 2d 626 (C.A. 3, 1953)	24
<i>People v. Thomas</i> , 25 Cal. 2d 880, 156 P. 2d 7 (1945)	29

	Page
<i>Pirie v. Chicago Title & Trust Co.</i> , 182 U.S. 438 (1900)	32
<i>Shomberg v. United States</i> , 348 U.S. 540, footnote 5 (1954)	8, 22, 30, 32
<i>Straton v. Hodgkins</i> , 109 W. Va. 536, 155 S.E. 902 (1930)	29
<i>Trailmobile Co. v. Whirls</i> , 331 U.S. 41 (1946)	8
<i>United States v. Anastasia</i> , 226 F. 2d 912 (C.A. 3, 1954)	25
<i>United States v. Atchison, T. & S.F. R. Co.</i> , 220 U.S. 37 (1910)	11, 31
<i>United States v. Elam et al.</i> , 76 F. Supp. 723 (D.W. Va. 1948)	29
<i>United States v. Hoffman</i> , 335 U.S. 77 (1948)	8, 12
<i>United States v. Menasche</i> , 348 U.S. 528 (1954),	9, 16, 18, 20, 24, 37
<i>United States v. Reisinger</i> , 128 U.S. 398 (1888)	29
<i>United States v. Tucker Truck Lines</i> , 344 U.S. 33 (1952)	8, 12
<i>U. S. ex rel. Aberasturi v. Cain</i> , 147 F. 2d 449 (C.A. 2, 1945)	19
<i>U. S. ex rel. Carson v. Kershner</i> , 228 F. 2d 142 (C.A. 6, 1955)	30
<i>U. S. ex rel. De Luca v. O'Rourke</i> , 213 F. 2d 759 (C.A. 8, 1954)	29, 30, 35
<i>U. S. ex rel. Lam Shin Hing v. Corsi</i> , 4 F. Supp. 591 (S.D.N.Y. 1933)	22
<i>U. S. ex rel. Sciria v. Lehmann</i> , 136 F. Supp. 458 (N.D. Ohio, 1955)	7, 26, 27, 30, 36
<i>U. S. ex rel. Vajtauer v. Commissioner</i> , 273 U.S. 103 (1926)	12
<i>U. S. ex rel. Zacharias v. Shaughnessy</i> , 221 F. 2d 578 (C.A. 2, 1955)	24
<i>Yanish v. Barber</i> , 128 F. Supp. 240 (N.D. Cal. 1955)	17

Statutes and Regulations:

Bankruptcy Act of March 18, 1950 (64 Stat. 420, 11 U.S.C. 1 Note)	17
Criminal Code, Act of June 25, 1948 (62 Stat. 683)	17

	Page
Displaced Persons Act of 1948 (50 U.S.C. App. 1953)	23
Immigration Act of February 2, 1917 (39 Stat. 874), Section 19 (8 U.S.C. 155)	5, 12
Immigration and Nationality Act of June 27, 1952, 66 Stat. 163	2
Section 101(a)(20), 66 Stat. 169, 8 U.S.C. 1401(a)(20)	8, 23
Section 101(a)(27)(C), 66 Stat. 169, 8 U.S.C. 1401(a)(27)(C)	8, 23
Section 204, 66 Stat. 179, 8 U.S.C. 1154	8, 23
Section 241(a), 66 Stat. 204, 8 U.S.C. 1251(a)	2, 8, 23
Section 241(b), 66 Stat. 208, 8 U.S.C. 1251(b)	3
Section 241(d), 66 Stat. 208, 8 U.S.C. 1251(d)	4
Section 244, 66 Stat. 214, 8 U.S.C. 1254	8, 23
Section 245, 66 Stat. 217, 8 U.S.C. 1255	8, 23
Section 246, 66 Stat. 217, 8 U.S.C. 1256	8, 23
Section 247, 66 Stat. 218, 8 U.S.C. 1257	8, 23
Section 249, 66 Stat. 219, 8 U.S.C. 1259	27
Section 301(c), 66 Stat. 236, 8 U.S.C. 1401(c)	36
Section 311, 66 Stat. 239, 8 U.S.C. 1422	30, 31
Section 313(a), 66 Stat. 240, 8 U.S.C. 1424(a)	30, 31
Section 315(a), 66 Stat. 242, 8 U.S.C. 1426(a)	30, 31
Section 318, 66 Stat. 244, 8 U.S.C. 1429	31
Section 331(d), 66 Stat. 252, 8 U.S.C. 1442(d)	31
Section 360(a), 66 Stat. 273, 8 U.S.C. 1503(a)	8, 23
Section 403(b), 66 Stat. 280, 8 U.S.C. 1101 Note	4
Section 405(a), 66 Stat. 280, 8 U.S.C. 1101 Note	4, 40
Internal Security Act, 8 U.S.C. 729(c), 64 Stat. 1015	
Nationality Act of 1940, 54 Stat. 1137	40
Section 228(b), 54 Stat. 1152, 8 U.S.C. 728(b) (1946 Ed.)	27
Section 347, 54 Stat. 1168, 8 U.S.C. 747	13, 29, 40
Patent Act of July 19, 1952, 66 Stat. 792, 35 U.S.C. 1	17
Selective Training and Service Act of 1940 (50 App. U.S.C. 316)	17
8 Code of Federal Regulations 142 (1949 Ed.)	26
8 Code of Federal Regulations 242.1 (1952 Ed.)	27
8 Code of Federal Regulations 243.1 (1952 Ed.)	27

Miscellaneous:

	Page
Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1953, p. 37; table 49	25, 26
Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1955, pp. 64, 75, 77, 84	25
Century Dictionary and Encyclopedia	29
Funk and Wagnalls Standard Dictionary	29
Hearings, Senate Appropriations Committee of Department of Justice Appropriation for 1954, 83d Congress, 1st Sess., p. 250 (1953)	35
Immigration Manual (1946), p. 1011	22
Oxford Universal English Dictionary	24
S. 716, 82nd Congress, 1st Session	14
S. 2550, 82nd Congress, 2nd Session	15
S. 3455, 81st Cong., 1st Session.	13, 42
Section 361	13, 42
Section 402(a) (13)	14
Section 402(a) (23)	14
Section 402(a) (39)	14
Senate Report 1515, 81st Cong., 2nd Sess., pp. 591, 637-640, 906, 907, 908	8, 22, 25, 26
Webster's Universal Dictionary	24
2 Sutherland, Statutory Construction, 3rd Ed., Sec. 4937	18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 72

JOHN M. LEHMANN, OFFICER IN CHARGE,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. BRUNO
CARSON OR BRUNO CARASANTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Court of Appeals is reported at 228 F. 2d 142 (R. 23-31), and the memorandum opinion of the District Court is unreported (R. 10-11).

Jurisdiction

The judgment of the Court of Appeals was entered on December 17, 1955, and on January 30, 1956, a petition for rehearing was denied. The petition for certiorari herein

was filed on April 27, 1956, and was granted on November 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether an alien who entered the United States as a stowaway in 1919 and who was not deportable under the prior immigration law (Immigration Act of February 5, 1917), became deportable under the provisions of the 1952 Immigration and Nationality Act.

2. Whether an alien who was not deportable under prior immigration law (Immigration Act of February 5, 1917) for a criminal offense which was pardoned became deportable under the provisions of the 1952 Immigration and Nationality Act.

3. Whether the preservation of "any status, condition, right in process of acquisition, act, thing, liability or matter" and the continuation of the statutes repealed (the Immigration Act of February 5, 1917) "unless otherwise specifically provided," under the savings clause of the 1952 Act, protects respondent's nondeportable status under the 1917 Immigration Act.

4. Whether the provisions of section 241(d) of the 1952 Act (8 U.S.C. 1251d) relating to retroactive application of the deportation section specifically provided for the discontinuance of the Immigration Act of 1917 and the elimination of nondeportable status acquired thereunder.

Statutes Involved

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

Section 241(a), 66 Stat. 204, 8 U.S.C. (1952 Ed.) 1251(a):

“Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry:

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;”

Section 241(b), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251(b) provides:

“(b) The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and

prosecution authorities, who shall be granted an opportunity to make representations in the matter."

Section 241(d), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251(d) provides:

"(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

Section 403(a), [66 Stat. 280] provides:

"The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

.

(13) Act of February 5, 1917 (39 Stat. 874)."

Section 403(b) [66 Stat. 280] provides:

"(b) Except as otherwise provided in section 405, all other laws, or parts of laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed."

Section 405(a), 66 Stat. 280, 8 U.S.C. (1952 Ed.) 1101 note provides:

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization,

certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecution, suits, actions, proceedings, statutes [statutes], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

"Section 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or shall be found in the United States in violation of this Act, or in violation of any other law of the United States; . . . shall, upon

the warrant of the Secretary of Labor, be taken into custody and deported: . . . Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned"

Statement

Respondent is a 53 year old native of Italy who came here in 1919 as a stowaway. He is married to a native-born citizen of the United States and is the father of four American-born children, the youngest of whom are aged 12 and 10 years. Respondent has been a carpenter and builder for several years, and his good character since 1941 is undisputed (R. 24-25).

In 1941 deportation proceedings were instituted against respondent based solely upon two convictions in 1936. These proceedings were cancelled in 1945 when Governor Lausche, of Ohio, granted respondent a pardon for one of his offenses conditioned upon his conducting himself thereafter as a law abiding person. This pardon indisputably granted respondent immunity from deportation under the law then in effect (R. 14, 24).

More than eight years later, in 1953, deportation proceedings were instituted anew against respondent under the 1952 Immigration and Nationality Act, although he had been law-abiding and of good character during the intervening period. An order of deportation was affirmed in 1954 by the Board of Immigration Appeals upon the ground that respondent was deportable for entry into the United States as a stowaway in 1919 and because of his two convictions in 1936. The pardon was refused recognition on the theory that it was not a full and unconditional pardon as required by the new law. The sole basis for the Board's decision was that section 241(d) [8 U.S.C. 1251(d)] ex-

empted the case from the operation of the savings clause of the 1952 Act (R. 18-20).

Respondent filed a writ of habeas corpus which was denied by the District Court (R. 4). It should be observed, however, that the same District Judge subsequently held in *U. S. ex rel Sciria v. Lehmann*, 136 F. Supp. 458 (N.D. Ohio, 1955), that an alien in the respondent's situation was not subject to deportation and there stated that his conclusion in this case had been in error. The District Judge's confession of error is contained in a footnote to his filed opinion in the *Sciria* case which is not published in his reported decision. Reference is made to it, however, in the opinion of the Court of Appeals in the instant case (R. 29).

The Court of Appeals reversed the dismissal of the writ and held that respondent had a nondeportable status under prior legislation which was preserved by the savings clause of the 1952 Act (R. 27-31). A petition for rehearing was denied (R. 31). In the District Court (R. 10), in the Court of Appeals upon original consideration (R. 27) and upon petition for reconsideration, the sole issue raised was whether section 241(d) specifically removed respondent's nondeportable status from the savings clause of the 1952 Act.

The petitions for certiorari herein in the instant case and the companion case of *Catalanotte* (No. 435) likewise raised no issue of according respondents a status under prior legislation. Both petitions raised solely the issue whether Section 241(d) eliminated such nondeportable status. Upon this issue alone, certiorari was granted.

Summary of Argument

I

Petitioner urges for the first time in his main brief that respondent did not acquire a status under prior legislation.

This contention comes too late as it was not raised administratively, in the courts below or in the petition for certiorari. *United States v. Tucker Truck Lines*, 344 U.S. 33 (1952); *United States v. Hoffman*, 335 U.S. 77, 79 (1948); *Trailmobile Co. v. Whirls*, 331 U.S. 41, 48 (1946).

II

Respondent is not subject to deportation if his status of nondeportability was preserved under section 405(a), the 1952 Immigration and Nationality Act Savings Clause (8 U.S.C. 1101 Note). He was not subject to deportation under legislation which was in effect prior to the 1952 Immigration and Nationality Act. This, the Board of Immigration Appeals acknowledges (R. 14). Moreover, deportation proceedings instituted against respondent in 1944 resulted in a 1945 order declaring him nondeportable (R. 13, 14). His status of nondeportability was therefore adjudicated administratively. The contention of petitioner that respondent's nondeportability under prior law was not a status, condition, or right in process of acquisition preserved by the savings clause of the 1952 Immigration and Nationality Act, is clearly without merit. The term status is rich in legal meaning and one of the broadest terms known to the law. *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 (1951); *Shomberg v. United States*, 348 U.S. 540, 547, footnote 5 (1954); *Heikkila v. Barber*, 345 U.S. 229, 236 (1952); *Kwong Chew v. Colding*, 344 U.S. 590, 600, 601 (1950). It covers any condition in life determined by law. *In re Zeigler*, 143 N.Y.S. 562, 567, 82 Misc. 346 (1913), and is used on dozens of occasions in the Immigration and Nationality Act of 1952. 8 U.S.C. 1101(a)(20), 1101(a)(27)(c), 1154, 1251, 1251(a)(9), 1254, 1255, 1256, 1257, and 1503. *Senate Report 1515*, 81st Congress, 2d Sess., p. 591, which preceded the 1952 Act, employs the term precisely as did

the Court below, to describe the situation of deportable aliens who can have such condition adjusted to a nondeportable status. In addition, the words of the savings clause, "condition and right in process of acquisition" are broad enough to cover respondent's case.

III

Moreover, we submit that petitioner reads only portions of the savings clause and misconceives the issues presented. The savings clause not only preserved existing statuses, it also preserved the statutory *status quo*. *United States v. Menasche*, 348 U.S. at 535 (1954). Unless otherwise specifically provided, the alien's status or condition is preserved. Unless otherwise specifically provided, so the savings clause says, existing legislation, under which respondent is not deportable, is to be continued as to his case. The principal issue then is whether the old or the new law controls respondent's case.

The savings clause of the 1952 Act is the broadest ever enacted by Congress. In its original draft (S. 3455, 81st Congress, 1st Sess., section 361) it was confined solely to nationality matters. In later versions it was broadened and applied to the entire legislation. Completed and pending deportation proceedings were specifically preserved in the savings clause. Congress was aware that thousands of aliens had been ordered deported but that their deportation had not been effectuated. It was aware that thousands of deportation proceedings were then pending under the old law. It was aware that many thousands of aliens had adjusted their status or acquired nondeportable status. Administrative relitigation of these cases, totalling hundreds of thousands, would have imposed an impossible burden on our immigration officials. Congress hardly desired that. Withal, it had no desire to disturb adjusted

cases, many thousands of which it had approved itself in the form of private bills and suspension of deportation. The savings clause, we therefore submit, the broadest ever enacted, contemplated preservation of adjusted or acquired nondeportable status.

IV

The issue here resolves itself into one whether mere retroactivity of the deportation provisions of the 1952 Act (8 U.S.C. 1251-d) specifically exempts respondent's case from the operation of the savings clause. This issue was not the subject of certiorari, argument or decision in *Marcello v. Bonds*, 349 U.S. 302 (1955).

Every known rule of statutory construction requires the resolution of this issue in respondent's favor.

First, it is clear that Congress did not intend to carve out an exception to the savings clause by the language of section 241(d). The language of section 241(d) was drafted when there was no savings clause for deportation cases. S. 3455, *supra*. Accordingly, it could not have been designed to preclude the operation of the savings clause.

Secondly, the savings clause authorizes an exemption from its operation only where, otherwise specifically provided. The word "specifically" requires precision. It requires "precise or explicit designation." *Melnick v. Melnick*, 147 Pa. Sup. 564, 25 A2 111 (1942). Section 241(d) is wanting in any such precise or explicit designation of a savings clause exemption.

Thirdly, the statutory Congressional scheme provided a savings clause exception by employing the words "notwithstanding section 405" in 8 U.S.C. 1422, 1424a, 1426a, 1429 and 1442d. "The presence of such provision in one part and its absence in the other, is an argument against reading it as implied." *United States v. Atchison T. & S.F.R. Co.*,

220 U.S. 37 (1910). There is no reason to suppose that Congress meant more than it said in section 241(d).

Fourthly, section 241(d) contains general language providing for retroactive application of some seven hundred grounds of deportation while the savings clause sets forth specific language preserving the *status quo*. The specific language of the savings clause should prevail over the general and vague language of section 241(d). *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1931).

Fifthly, the cardinal principle of statutory construction is to preserve and not to destroy. *National Labor Relations Board v. Jones & Laughlin*, 301 U.S. 1, 30 (1936). Preservation of the *status quo* of respondent is in line with this principle and the purpose of Congress herein.

Sixthly, if possible, effect should be given to all the words of a statute. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882). The decision below accomplishes this objective (R. 30).

Finally, deportation statutes should be strictly interpreted to avoid banishment of a resident of forty-five years with an American wife and four native born children. *Fong Haw Tan v. Phelan*, 333 U.S. 10 (1947).

The decision below complies with these principles of statutory construction. It refused to authorize deportation in the absence of a clear Congressional mandate which is absent here. The judgment below should be affirmed.

I

Whether Nondeportability Is a Status Is a New Issue Which Petitioner May Not Raise for the First Time in This Court.

Before the Board of Immigration Appeals the issue presented was whether section 241(d) of the 1952 Immigration

Act "otherwise specifically provided" so that respondent's immunity from deportation under the 1917 Immigration Act was lost (R. 19). In the pleadings (R. 5), in the District Court (R. 10), and in the Court of Appeals (R. 27) this was the issue presented. In his petition for rehearing in the Court of Appeals and in his petition for certiorari, petitioner raised no other issue.

We believe that the contention that respondent had no status under the 1917 Immigration Act which could be preserved is completely without merit as we will demonstrate in Point II herein. In any event, we submit that it is too late to raise this issue now. Whether nondeportability was a status was not raised below or administratively.

1. It was not raised in the petition for certiorari and should not be considered as an issue before this Court. *Trailmobile Co. v. Whirls*, 331 U.S. 41, 48 (1946).

2. The issue was not raised administratively. It was not a basis of the decision of the Board of Immigration Appeals (R. 18-20). Failure to raise an issue administratively precludes its consideration judicially. *United States v. Tucker Truck Lines*, 344 U.S. 33 (1952); *U.S. ex rel. Vajtauer v. Commissioner*, 273 U.S. 103, 113 (1926).

3. The issue was not raised in the courts below and should not be considered for the first time in this Court. *United States v. Hoffman*, 335 U.S. 77, 79 (1948).

II

The 1952 Savings Clause, the Broadest ever Enacted by Congress, Requires Application of the 1917 Immigration Act to Respondent and Preserves His Status Thereunder.

Respondent was not subject to deportation under the 1917 Immigration Act (8 U.S.C. 155). The Board of Immigration Appeals so found (R. 14-15), and this much petitioner concedes.

Petitioner, however, now seeks for the first time to claim that respondent did not have a status under prior immigration legislation which could be preserved by the 1952 Immigration Act (Brief p. 24, No. 435, Brief p. 19, No. 72). Petitioner states that "mere nonaction" of Congress does not grant an "affirmative privilege" or status (Brief, No. 72, 19-20), that "in the absence of some affirmative action by Congress extending to such aliens a privilege of this nature, the savings clause has no application" (Brief, No. 435, p. 26), and finally that petitioner acquired no "vested right" to escape deportation. We have several answers to this belated frivolous contention raised outside the scope of the petition for certiorari. In brief, we will show that the term status in the 1952 Act savings clause is about as broad a legal term as can be imagined and that it encompasses and preserves respondent's nondeportability under prior legislation. In addition, the savings clause speaks of "conditions" and "right in process of acquisition." Petitioner avoids discussion of these terms which likewise cover respondent's nondeportability under the 1917 Act. Finally, we submit that the real issue here is not one of status, but rather one as to which law governs, the old or the new and whether section 241(d) by specific provisions prevents the continuation of the old law, preserved by the savings clause. Proper analysis of this issue initially directs attention to the Congressional history of the savings clause.

*(A) HISTORY OF THE 1952 ACT SAVINGS CLAUSE

1. *S. 3455, 81st Congress, 1st Session, Section 361.* This Court observed in *United States v. Menasche*, 348 U.S. 528, 532 (1954), that section 347 of the Nationality Act of 1940 (8 U.S.C. 747) was the direct antecedent of the 1952 Act savings clause. A comparative print of the two savings clauses is set forth in Appendix A herein. The 1940 Act

savings clause was originally taken verbatim and placed in the naturalization title (Title III) of the first McCarran bill (S. 3455, 81st Congress, 1st Session, section 361). The full text of these provisions is set forth in Appendix B to this brief. The only changes made in S. 3455 were (a) the addition of the words "status and condition" and (b) the provision that it was to apply "unless otherwise specifically provided" in the naturalization title (Title III). As worded and as set forth in Title III, the savings clause was strictly limited to nationality and naturalization matters. Significantly, it is a savings clause thus limited to naturalization matters which is analyzed by petitioner in his brief (No. 435, p. 22, footnote 11).

In S. 3455, section 402(a)(13), 402(a)(23) and 402(a)(39) repealed the existing immigration laws without any savings clause. The repeal of preexisting laws without a savings clause or a retroactive provision would have rendered previously deportable aliens immune. *United States v. Reisinger*, 128 U.S. 398, 480 (1888). Accordingly, to cover deportable aliens under preexisting law, it was necessary to provide in section 241(d) that the grounds of deportation be retroactive. This was the purpose of section 241(d) as revealed by its legislative history and as found by the court below (R. 30). Aliens deportable under preexisting laws were to remain deportable. S. 3455 further reveals that 241(d) was there set forth as in the final version of the law. It was not drafted to carve out a savings clause exemption because when it was prepared, there was no savings clause for deportation cases.

2. *S. 716, 82nd Congress, 1st Session.* S. 716 removed the savings clause from the nationality section of the bill and placed it in section 405, making it applicable to the entire Act rather than to the nationality section alone. To the

repealing section (403) was added a paragraph (b) reading:

"Except as otherwise provided in section 405, all other laws, or parts of laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed."

To section 405 there was added the phrase "right in process of acquisition." In addition the following were also to be preserved under the old law:

"warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect. . . ."

Thus, as we will show later, Congress desired at minimum that deportation cases adjudicated administratively under prior law, as was respondent's situation, continue to be controlled by prior legislation.

3. *S. 2550, 82nd Congress, 2d Session.* S. 2550 added a further sentence to the savings clause reading as follows:

"An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the effective date of this Act, shall be regarded as a proceeding within the meaning of this subsection."

(B) THE 1952 SAVINGS CLAUSE IS THE BROADEST EVER ENACTED BY CONGRESS

1. The foregoing analysis of the successive stages through which the 1952 savings clause passed in the various drafts of the bills which led to the enactment of the 1952 Immi-

gration and Nationality Act shows that each bill enlarged the savings clause. From a savings clause limited to nationality matters, it was expanded into one covering the whole field of immigration and nationality. From a bill limited to proceedings, acts, things, and matters, it was expanded to one covering warrants of arrest, orders of deportation and exclusion, suspension and displaced person's applications, statuses, conditions, and rights in process of acquisition. The broadening of the savings clause with each successive draft speaks more eloquently of its all inclusive scope than any commentary in Congressional reports.

2. The history of other immigration and nationality savings clauses outlined in *United States v. Menasche*, 348 U.S. 528, at 532 (1954), demonstrates, as this Court concluded, that the:

"1952 Act made the enumeration of matters preserved . . . more complete and all inclusive" and that the "consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." 348 U.S. at 533, 535.

We submit that the Court below appropriately noted (R. 29-30):

"Other federal courts have uniformly given a broad interpretation to section 405 in varying factual situations. See *United States ex rel. De Luca v. O'Rourke*, 213 F. (2d) 759 (8 Cir. 1954); *Yanish v. Barber*, 211 F. (2d) 467 (9 Cir., 1954); *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N.D. Cal., 1954); *Yanish v. Barber*, 128 F. Supp. 240 (N.D. Cal., 1955); *Petition of Pringle*, 122 F. Supp. 90 (E.D. Va., 1953), *aff'd per curiam*

sub nom. United States v. Pringle, 212 F. (2d) 878 (4 Cir., 1954). On occasion, this uniformly broad interpretation has led to a result adverse to the alien. See *United States v. Matles-Freidman*, 115 F. Supp. 261 (E.D. N.Y. 1953); *United States ex rel. Circella v. Neelly*, 115 F. Supp. 615, 625-626 (N.D. Ill., 1953)."

3. In discussing the 1952 savings clause, the District Court in *Yanish v. Barber*, 128 F. Supp. 240, 242 (N.D. Cal. 1955), observed:

"It is difficult to imagine a more inclusive savings clause. . . ."

The 1952 Act savings clause has been described as one of "unusual breadth." *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N.D. Cal. 1954). That it is broader than the savings clause of the 1940 Nationality Act (8 U.S.C. 747a) is beyond dispute. Yet, that savings clause was described as being "about as broad as language could be." *Bertoldi v. McGrath*, 178 F. 2d 977, 978 (CA.D.C. 1949).

The narrowness of other savings clauses only serves to emphasize the broad scope of the 1952 Act. The Selective Training and Service Act of 1940 (50 App. U.S.C. 316) merely preserved offenses committed prior to such Act. The Criminal Code (Act of June 25, 1948, 62 Stat. 683) preserved rights and liabilities under repealed statutes. The Bankruptcy Act of March 18, 1950, preserved existing penalties, forfeitures and liabilities (64 Stat. 420; 11 U.S.C. 1 Note). The Patent Act of July 19, 1952, enacted during the same session of Congress as the Immigration and Nationality Act, protected existing rights and liabilities. (66 Stat. 792, 815). Thus, it is clear beyond peradventure that the savings clause here under consideration was intended to be and is the broadest ever enacted by Congress.

(C) THE SAVINGS CLAUSE REQUIRES APPLICATION OF EXISTING LAW UNLESS "OTHERWISE SPECIFICALLY PROVIDED"

Discussion of the interrelation of the savings clause (section 405) to the deportation section (241) is reserved until Point III. Here our purpose is to define and analyze the savings clause.

1. *Existing Law Preserved*

Section 405(a) has a dual aspect. It preserves "any status, condition, right in process of acquisition, act, thing, liability, obligation or matter, . . . warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding" existing on its effective date unless otherwise specifically provided. In addition, it continues as to all such preserved items the statutes repealed "unless otherwise specifically provided."

The foregoing clearly demonstrates that the issue is not solely preservation of status, but an issue as to whether the old or the new law controls. The problem is succinctly covered by this Court's observation in *United States v. Menasche, supra*, 348 U.S. at 435, that under the savings clause: "the statutory *status quo* was to continue. . . ."

The issue is similarly analyzed in 2 *Sutherland, Statutory Construction*, 3rd Ed., Section 4937:

"A savings clause is, like a proviso, an exemption from the general operation of a statute. It is generally employed to restrict repealing acts; to continue repealed acts in force as to existing powers, inchoate rights; penalties incurred and pending proceedings. A repeal destroys such rights, powers and proceedings and discharges the penalties. Thus to preserve them a special provision with saving effect is necessary."

2. Existing Statutes Preserved

The 1952 savings clause specifically preserves any status existing under former legislation. Petitioner argues that mere non-action by Congress does not create a status (Brief, No. 72, p. 19), than an alien must go "at least part way toward satisfaction of the requirements set forth by Congress with respect to certain privileges relating to immigration and naturalization" (No. 435, p. 26) in order to acquire a status. What requirements petitioner contemplates are not described. Finally petitioner shifts from the status question and asserts that respondent acquired no "vested right" with respect to deportation (No. 435, p. 29).

The issue is not whether respondent acquired a vested right to remain here. This Court sustained the power of Congress to retroactively deprive an alien of his residence here in *Marcello v. Bonds*, 349 U.S. 302 (1954). The issue, however, is whether Congress through its statutory enactment has preserved respondent's residence here or taken it away. As we have indicated above, the present controversy can be solved by determining whether the old law or the new applies without defining the terms "status, condition, or right in process of acquisition." It should be observed, moreover, that although these terms were originally inserted to resolve a conflict in derivative citizenship cases as petitioner asserts (No. 72, p. 21), when the savings clause was expanded to cover deportation cases, it was no longer so limited [see Point II(A), *supra*].

This conflict in derivative citizenship cases was between *U.S. ex rel. Aberasturi v. Cain*, 147 F. 2d 449 (C.A. 2, 1945), which declined to preserve under the 1940 savings clause "a mere condition unattended by any affirmative action by the alien or by anyone else," and *Bertoldi v. McGrath*, 178 F. 2d 977 (C.A.D.C. 1949), which reached a contrary result.

The present savings clause is, as petitioner admits, "an obvious attempt to overcome the *Aberasturi* case." (Brief, No. 435, p. 22, footnote 11). Accordingly, this Court observed in *United States v. Menasche*, 348 U.S. at 535:

"It should be noted, further, that the conflict between *Aberasturi* and *Bertoldi* involved a situation where the alien had failed to take *any* affirmative action to assert his claim to citizenship. Even the more restrictive *Aberasturi* opinion recognized that affirmative action by the alien might alter the result there reached. 147 F. 2d at 542. If Congress was willing to preserve a 'mere condition unattended by any affirmative action,' we think its savings clause also reaches instances, such as this, where affirmative action is present."

Petitioner's argument that some affirmative action was required to preserve respondent's status, therefore, can not be sustained. However, if affirmative action is required, in the instant case such action was taken by the Government. Here deportation proceedings were instituted in 1941, and it was administratively adjudicated in 1945 that respondent was not deportable (R. 14, 15, 24). Additionally, respondent's long residence here, i. e., entry in 1919, afforded him immunity from deportation on the stowaway charge (R. 30, 31). Of interest in this connection is this Court's statement in *United States v. Menasche*, 348 U.S. at 536:

"It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under § 405 (a). . . . But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in § 405(a), derived verbatim from § 347 (a) of the 1940 Act. . . ."

Moreover, there has been an affirmative determination by Congress itself to save from deportation those aliens who are in the respondent's circumstances. By the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155), Congress expressly limited deportation of illegal entrants to a period within five years after entry. In the same manner Congress relieved from deportation those aliens convicted of crime, who had been pardoned. The savings clause, which expressly preserved any existing status or condition and which expressly continued in effect as to such status or condition the Act of 1917, represents a reaffirmation by Congress of its policy "not to strip aliens of advantages gained under prior laws." *United States v. Menasche*, 348 U.S. at 535.

Petitioner would encase the term "status" in a verbal straight-jacket and deny the immunity granted respondent under prior laws by equating status to a "vested right" which we do not assert. That respondent was not deportable under prior laws is acknowledged by the Board of Immigration Appeals (R. 14). We believe that it is not necessary to refer to this as a nondeportable status if prior laws control as we contend. We submit, however, that the Court below properly referred to this as a status of nondeportability (R. 29).

The term status has a long history in immigration terminology, and it is rich in legal meaning. "Whenever a condition in life is determined by law, and not by act of the parties, it is correctly denominated a status in jurisprudence, and even in the terminology of the common law itself." *In re Zeigler*, 143 N.Y.S. 562, 567, 82 Misc. 346 (1913). There is the status of husband and wife, marital status, the status of parent and child, of adoption and guardianship. *Restatement of Conflict of Laws*, p. 181-182. We speak of the status of an alien, *Harisiades v.*

Shaughnessy, 342 U.S. 580, 586 (1951), enemy alien status, *Shomberg v. United States*, 348 U.S. 540, 547, footnote 5 (1954), the status of citizenship or eligibility for citizenship, *Heikkila v. Barber*, 345 U.S. 229, 236 (1952), the status of a continuous resident (alien) physically present in the United States, *Kwong Chew v. Colding*, 344 U.S. 590, 600, 601 (1950), and legal status to institute or maintain a lawsuit. *Doremus v. Board of Education*, 342 U.S. 429, 436 (1951). Mr. Justice Douglas, dissenting.

The term is no stranger to those familiar with our immigration laws and practices. For years our immigration authorities have maintained a status section in its Washington and district offices charged primarily with supervision of the status of aliens here on temporary basis. *Immigration Manual* (1946), p. 1011. As early as 1926 immigration regulations were concerned with the status of visiting aliens, *U.S. ex rel. Lam Shin Hing v. Corsi*, 4 F. Supp. 591, 593 (S.D.N.Y. 1933). Immigration decisions speak of status as an alien, *Matter of C.*, V, I&N Dec. 370, 371; diplomatic status, *Matter of S.H.C.C.*, IV, I&N Dec. 36, 42; status as a student visitor, *Matter of A.I.C.*, IV, I&N Dec. 630, 631; and non-immigrant status, *Matter of DeP.*, I, I&N Dec. 151.

Senate Report 1515, 81st Congress, 2d Session, p. 591, which preceded the introduction of the bills culminating in the 1952 Immigration and Nationality Act, devotes a chapter to "adjustment of status." It is there stated:

"Legality of *status* is a matter of degree. Most aliens in this country are here lawfully for all purposes. A few are eligible for reentry documents, but do not have *status* sufficient for naturalization purposes; a large number are eligible neither for naturalization nor reentry documents, but still are not deportable; and many are subject to deportation, yet eligible to have that *status* changed without deportation.

“*Status* may be adjusted by administrative procedure, treaty, registry, suspension of deportation, voluntary departure, or preexamination, change of *status*, or an act of Congress.”

Thus, Congress, itself, placed aliens subject to deportation in a status. By the same token those not deportable had a status and it is significant that the 1952 Immigration and Nationality Act, and particularly the immigration sections frequently use the term status.

Section 101(a)(20) [8 U.S.C. 1101(a)(20)] refers to the status of lawful permanent residence, section 101(a)(27)(c) [8 U.S.C. 1101(a)(27)(c)] to nonquota status, and section 204 [8 U.S.C. 1154] to immigrant status.

Chapter 5 which precedes section 241 (8 U.S.C. 1251) is headed “Deportation; Adjustment of Status.” Section 241(a)(9) [8 U.S.C. 1251(a)(9)] provides for the deportation of aliens who have violated their status as non-immigrants. Section 244 (8 U.S.C. 1254) authorizes the adjustment of status of deportable aliens. Sections 245 and 246 (8 U.S.C. 1255, 1256) provide for the adjustment of status from nonimmigrant to permanent resident and the rescission of such adjustment. Section 247 (8 U.S.C. 1257) authorizes the adjustment of status from permanent resident to nonimmigrant. Section 360(a) (8 U.S.C. 1503a) refers to the status of a national of the United States. Finally, the 1952 Act savings clause itself preserves applications for adjustment of status under the Displaced Persons Act (50 U.S.C. App. 1953).

In the light of this fertile and broad usage of the word status by the statute itself, by judicial and administrative decisions, by Congress and by the report preceding the introduction of the 1952 Act, there can be no doubt that the Court below correctly applied the term.

3. Existing "Conditions" Preserved

The 1952 savings clause preserves preexisting conditions. If respondent did not acquire a status, certainly the preservation of his condition of nondeportability is covered by the savings clause. Condition is defined by lexicographers as meaning "state of being," "characteristics" or "situation in relation to environment."¹ It frequently is employed legally to denote a circumstance or situation. *P. Dougherty Co. v. United States*, 207 F. 2d 626, 630 (C.A. 3, 1953). It has been described as a word of flexible meaning and indefinite application, *Great Eastern Casualty Co. v. Smith*, 174 S.W. 687, 688 (Tex. Civ. App., 1915). The elasticity of the term "condition" in the context of the savings clause here involved, certainly encompasses respondent's situation of nondeportability.

4. Existing Rights in Process of Acquisition Preserved

Petitioner attempts to defeat the operation of the savings clause by asserting that the grant of a status of nondeportability to respondent would result in a vested right. The same surprising claim might have been made in *Bertoldi v. McGrath*, *supra*. There, as here, there was no claim of vested right. There a savings clause of narrower scope was held to cover inchoate rights or those in process of acquisition.

This Court observed in *United States v. Menasche*, *supra*, that under the savings clause the statutory *status quo* was to continue as to rights not fully natured." In *United States ex rel Zacharias v. Shaughnessy*, 221 F. 2d 578, 580 (C.A. 2, 1955), an alien illegally in the United States was held to have a status or right in process of acquisition by reason of steps taken by his wife to secure a visa. Re-

¹ Webster's Universal Dictionary, Oxford Universal English Dictionary.

spondent's position is stronger. Unlike Zacharias who was deportable under existing law, respondent had acquired a status or condition of nondeportability. He had a long residence here, and by appropriate further steps known as registry [8 U.S.C. 1946 Ed., 728b; *United States v. Anastasia*, 226 F. 2d 912 (C.A. 3; 1954)]; he could and can utilize that residence and nondeportable status for naturalization purposes. Thus respondent had rights not fully matured or in process of acquisition.

5. *Existing Deportability, Nondeportability, as well as Deportation and Exclusion Proceedings Preserved*

In the same fiscal year that Congress enacted the 1952 Immigration and Nationality Act, 516,082 aliens were admitted as nonimmigrants or as visitors, 265,520 were admitted for permanent residence, 20,181 aliens were physically deported, and 5,050 aliens had been excluded.² Thousands of additional aliens were ordered deported or excluded, but effectuation of such orders defeated for want of a receiving country.³ In addition, from 1950 to 1953, 4,388 cases had been submitted to Congress for adjustment of status under section 4 of the Displaced Persons Act of 1948 (50 App. U.S. 1953).⁴ Over the years 1942-1949 more than 15,000 cases had been adjusted through suspension of deportation⁵ and 45,000 preexamination cases had been con-

² Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1955, pp. 64, 75, 77, 84.

³ Senate Report 1515, 81st Cong. 2d Sess., pp. 637-640; states that there are 3,600 nonenforceable deportation orders.

⁴ Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1953, p. 37. Under the Displaced Persons Act an alien must show a legal entry as a visitor. However, he is often illegally here by reason of overstaying his visit.

⁵ Senate Report 1515, *supra*, p. 906. Suspension of deportation requires that an alien be deportable, 8 U.S.C. 155(c), 62 Stat. 1206. The alien may be one who has entered the United States illegally. Upon Congressional approval of the case a record is made of his lawful residence.

sidered.⁶ In addition, over the years several hundred private immigration bills have been enacted legalizing the status of deportable aliens.⁷ These adjustment cases under the suspension provisions of the law (8 U.S.C. 155c and 8 U.S.C. 1254), under preexamination (8 C.F.R. 142, 1949 Ed.), under the Displaced Persons Act (50 App. U.S.C. 1953), and through private bills, all involved aliens who either entered illegally or who were subject to deportation prior to 1952. Under the terms of section 241(d), although their status has now been adjusted, all of these individuals are now deportable unless their status of nondeportability is preserved by the savings clause.⁸ See: *U. S. ex rel. Sciria v. Lehmann*, 136 F. Supp. 458, 462 (N.D. Ohio 1955). In 1952 there were also 1,204 criminal prosecutions pending for violations under our immigration laws.⁹

Congress in enacting the savings clause did not desire to impose upon the Immigration Service the impossible task of retrying all these thousands of cases administratively. It is inconceivable that it considered upsetting the thousands of suspension cases and hundreds of private bill cases it had approved itself. Moreover, Congress continued its desire to accord favored treatment to aliens who had come here, as respondent did, prior to 1924.¹⁰

⁶ Senate Report 1515, supra, p. 907. Preexamination authorizes a deportable alien to proceed to Canada for the purpose of securing a visa and returning as a lawful permanent resident. 8 C.F.R. 142 (1949 Ed.).

⁷ From 1939 to 1949, 249 of such private bills were enacted into law. Senate Report 1515, supra, p. 908. The figures since 1949 are much higher.

⁸ Under the 1952 Act the original illegal entry or a subsequent entry of an alien may be utilized to predicate a deportation order. *Bonetti v. Brownell* (C.A. D.C. No. 12885, December 5, 1956).

⁹ Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1953, table 49.

¹⁰ "It is unreasonable to suppose that Congress would reverse its long standing policy towards excludable aliens who entered this country prior to July 1, 1924, otherwise than by a plain and specific declaration of its

Accordingly, warrants of deportation under the prior law—issued after a deportation case was finally determined (8 C.F.R. 1952 Ed. 243. 1) were specifically preserved. Warrants of arrests initiating the deportation proceeding (8 C.F.R. 1952 Ed. 242. 1) were specifically kept in force under the old law under the savings clause. The deportation proceeding itself and statuses were likewise preserved. The savings clause specifically reads that unless otherwise specifically provided, nothing shall affect the validity of any:

“warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect.”

Obviously, Congress desired pending deportation proceedings whether completed or not to be governed by the old law. Why continue pending proceedings if they were to be relitigated when completed under the new law? Not only old orders of deportation were to continue in force, but old “documents or proceedings.” In the instant case, the respondent’s 1945 deportation hearing and order cancelling his deportation was a document or proceeding which was preserved even as a pending proceeding would have been. It matters not that the proceeding was begun in 1941 rather than in 1951 or that it had finally adjudicated. Congress by the savings clause desired no administrative relitigation of hundreds of thousands of cases. It desired to preserve pending and completed deportation proceedings, deportable and nondeportable statuses. This is clear

purpose to do so.” *U.S. ex rel. Sciria v. Lehmann, supra*, 136 F. Supp. at 462. Such aliens have been permitted to become lawful permanent residents by registry proceedings under 8 U.S.C. 728b (1946 Ed.) and 8 U.S.C. 1259 (1952 Ed.).

from the historical background of the enactment and the broad encompassing language of the savings clause.

III

The Retroactive Deportation Provisions of Section 241 Do Not Specifically Provide an Exception to the Savings Clause.

It is our view that section 241 (8 U.S.C. 1251) of the 1952 Immigration and Nationality Act did not otherwise specifically provide for the deportation of those protected by the savings clause. We admit as did the Court below (R. 30) that some provisions of section 241 are retroactive and that others are not. Where prospective application of section 241 was desired, the word "hereafter" was used. Except as provided in section 241, section 241(d) made the deportation provisions retroactive. However, we do not reach the retroactive provisions of the new law unless the new law applies. We must, therefore, first determine which law is applicable. The savings clause preserves the statutory *status quo* and prevents the operation of the 1952 Act unless "otherwise specifically provided." *United States v. Menasche, supra; Shomberg v. United States, supra*. The heart of the issue herein, then, is not whether section 241 is retroactive, as all agree, but rather whether the old or the new law governs. Stated otherwise, the issue is whether the mere retroactivity of section 241(d) constitutes sufficient specificity to preclude operation of the savings clause.

(A) MEANING OF WORDS "OTHERWISE SPECIFICALLY PROVIDED."

In section 403(b) Congress stated that section 405 applied "except as otherwise provided." In the Nationality

Act of 1940, 8 U.S.C. 747a, the savings clause applied, "unless otherwise provided."¹¹ However, in enacting section 405 Congress twice stated that it was to apply "unless otherwise *specifically* provided." Unless otherwise *specifically* provided the prior legislation was to govern. Unless otherwise *specifically* provided the existing status, condition, and right in process of acquisition were to remain valid.

The word, "specifically," meant something to Congress when it added it to the savings clause and when it inserted it in section 405 and not in section 403 or in other legislation. It is a term which demands precision. The word "specifically" as defined by the lexicographers and judicial decisions is equivalent to the word "precisely" or "expressly."¹²

Section 241 is not precise in carving an exception to the savings clause. On the contrary, it makes no reference to it at all. It is not explicit in directing whether aliens who have acquired an adjusted status or a nondeportable status under prior legislation and under judicial recommendations are now to become deportable. *U.S. ex rel.*

¹¹ Savings clauses contained similar language ever since 1871 when Congress enacted a general savings clause to prevent release of liabilities under penal statutes "unless the repealing Act shall so expressly provide." 16 Stat. 432; 1 U.S.C. (Supp. V) 29; *United States v. Elam et al.*, 76 F. Supp. 723, 724 (D.C. W. Va. 1948); *United States v. Reisenger*, 128 U.S. 398, 480 (1888).

¹² "Specifically means in a specific manner, explicitly, particularly, definitely." *Straton v. Hodgkins*, 109 W. Va. 536, 155 S.E. 902 (1930). "Specific implies precise or explicit designation," *Melnick v. Melnick*, 147 Pa. Sup. 564, 25 A2 111 (1942). Specific means precisely formulated or restricted, definite, explicit, or an exact or particular nature. *People v. Thomas*, 25 Cal. 2d 880, 889, 156 P. 2d 7, 17 (1945). "The word 'specifically' is equivalent to the word 'definitely' or 'precisely.'" *Emack v. Campbell*, 14 App. D.C. 186, 190 (1899).

The Century Dictionary and Encyclopedia defines specifically as meaning "particularly, definitely, explicitly." Funk and Wagnalls Standard Dictionary defines it as "expressly, explicitly, particularly, definitely."

De Luca v. O'Rourke, 213 F. 759 (C.A. 8, 1954); *U. S. ex rel. Carson v. Kershner*, 228 F. 2d 142 (C.A. 6, 1955); *U.S. ex rel Sciria v. Lehmann*, 136 F. Supp. 458 (N.D. Ohio, 1955).

(B) LEGISLATIVE HISTORY OF OMISSION OF EXPLICIT EXCEPTION TO SECTION 405

Section 241 did not and could not specifically suspend the operation of the savings clause when it was originally drafted. In its original form, S. 3455, 81st Congress, 1st Session, contained section 241(d), but no deportation savings clause. The savings clause for deportation cases was inserted in subsequent drafts. Nevertheless, after the savings clause was added and expanded in these subsequent drafts of the bill, no attempt was made to have 241(d) explicitly carve an exception to 405 by a cross reference to that section. The omission of any cross reference or explicit exception to section 405 is significant.

(C) STATUTORY SCHEME FOR EXEMPTION FROM SAVINGS CLAUSE

In the drafts which followed S. 3455 Congress methodically reviewed the various statutory provisions of the 1952 Act and carved out exceptions. In *Shomberg v. United States*, 348 U.S. 540 at 547 (1954), this Court noted that Congress had established a statutory scheme which exempted certain provisions of the Act from the operation of the savings clause. In each case Congress specifically provided for such exemption by the language "notwithstanding the provisions of section 405 of the Act." This Court, in *Shomberg v. United States*, listed the sections exempt from section 405 as follows: Section 311 (8 U.S.C. 1422); Section 313(a) (8 U.S.C. 1424a); 315(a) (8 U.S.C.

1426a); 318 (8 U.S.C. 1429); and 331(d) (8 U.S.C. 1442d).¹³

The fact that Congress said explicitly and clearly what it meant in these sections with reference to avoiding the savings clause is strong evidence that it did not mean what it did not "precisely" or "explicitly" say in section 241(d).

As Mr. Justice Holmes said in *United States v. Atchison T. & S. F. R. Co.*, 220 U.S. 37 (1910):

"The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied. . . . We see no reason to suppose that Congress meant more than it said."

The presence of the phrase, "notwithstanding section 405," in sections 311, 313, 315(a), 318 and 331(d) and its absence from section 241(d) should foreclose reading it by implication into the section from which it is absent. The

¹³ Section 311 provides that the right to naturalization shall not be abridged because of race, sex or marriage, and, "notwithstanding section 405(b) this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this Act." 66 Stat. 239, 8 U.S.C. 1422, 8 U.S.C.A. 1422.

Section 313(a) states: "Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized" who engages in specified subversive activities or who is a member of described subversive organizations. 66 Stat. 240, 8 U.S.C. 1424(a), 8 U.S.C.A. 1424(a).

Section 315(a) provides: "Notwithstanding the provisions of section 405(b)," one who claims or has claimed his alienage and "is or was" thereby relieved of service in the armed forces, "shall be permanently ineligible to become a citizen." 66 Stat. 242, 8 U.S.C. 1426(a), 8 U.S.C.A. 1426(a).

Section 318 provides in part: "Notwithstanding the provisions of section 405(b), and except as provided in section 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other act." 66 Stat. 244, 8 U.S.C. 1429, 8 U.S.C.A. 1429.

Section 331(d) provides for the ending of enemy alien status and states: "Notwithstanding the provisions of section 405(b), this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this Act and which is still pending on that date." 66 Stat. 252, 8 U.S.C. 1442(d), 8 U.S.C.A. 1442(d).

difference in language indicates a difference in legislative intention. *Brewster v. Gage*, 280 U.S. 327, 336 (1929); *Crawford v. Burke*, 195 U.S. 176 (1904); *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 448 (1900).

Shomberg v. United States, *supra*, is not to the contrary as petitioner asserts. On the contrary it supports our view. Congress in section 318 specifically carved out an exception to section 405(b) by using the notwithstanding language. Aliens found deportable were not to be naturalized under the Internal Security Act, 8 U.S.C. 729(c), 64 Stat. 1015, which was existing law, nor under the new law. The specific exemption from 405(b) which expressly covered naturalization proceedings was sufficient to carry an exemption from the entire savings clause and particularly from section 405(a). This Court made it quite clear, however, that in the absence of a *specific* provision to the contrary, the savings clause prevailed. It said (348 U.S. at 543):

“We agree with petitioner that, absent a specific provision to the contrary, he has rights protected by § 405(a). . . . But we hold that § 318 specifically excepts rights under the prior law from the protection of § 405, when these rights stem from a petition for naturalization or from some other step in the naturalization process.”

In a footnote to the last quoted sentence, this Court proceeded to leave open the question here presented, saying:

“This is not to say that petitioner cannot challenge the authority of the Attorney General to deport him under § 241(a) of the 1952 Act. We express no opinion as to whether such a challenge, grounded on the savings clause or otherwise, might succeed if made in the deportation proceedings.”

The issue continued to remain open after this Court's decision in *Marcello v. Bonds*, 349 U.S. 302 (1955). Petitioner misinterprets the scope of that decision, although fully aware of its complete background. Traditionally, this Court does not decide or foreclose issues not presented to it or in the Courts below. The present issue although presented administratively (Pet. Brief, No. 435, p. 17), was not raised by Marcello in the lower courts. *Marcello v. Bonds*, 113 F. Supp. 22, 212 F. 2d 830 (C.A. 5, 1954). That this issue was not before this Court was acknowledged by the Government in its Marcello brief. Marcello belatedly sought certiorari on this issue for the first time in a supplemental petition for certiorari which was denied, 348 U.S. 805. The petitioner, himself, described Marcello's argument in his brief as a mere suggestion that the savings clause applied.¹⁴ The issue was not presented in oral argument by either side. This Court's *Marcello* decision does not discuss the savings clause or its interrelation with the deportation provisions. We submit that under the circumstances, the Court below was justified in concluding in No. 435 (236 F. 2d 955):

"*Marcello v. Bonds*, 349 U.S. 302, cited by the Government, is not here applicable since it is not concerned with the savings clause which is the provision of the statute that controls disposition of this case."

¹⁴ In its Marcello Brief, No. 145, October 1954 Term, at page 41, footnote 8, the Government said:

"While petitioner *suggests* in his brief (Pet. Br. pp. 41-42) that it is doubtful whether Section 241, when read in the light of the savings clause of Section 405(a) (Pet. Br. 61-62) can be applied retroactively to effect his deportation, *this contention is not properly before the Court*, since it was presented only in his supplemental petition for certiorari which was denied, 348 U.S. 805." (Italics supplied).

(D) LACK OF SPECIFICITY OF SECTION 241

Petitioner admits, as he must, that the words of art, employed by Congress elsewhere in the statute (the terms "notwithstanding section 405") are not employed in section 241. He contends that mere general retroactivity of the relevant provisions of section 241 is sufficient specificity to preclude operation of the savings clause. That was not the Congressional intent when section 241(d) was drafted (Point IIA, *supra*). On the contrary, the retroactive provisions of 241(d) were intended as the Court below stated, to cover aliens deportable under prior laws (R. 30). The Court below likewise found that section 241(d) did not explicitly disturb aliens in a nondeportable status (R. 29).

Respondent's status is governed by two "specific provision" requirements set forth in the savings clause. One relates to the status or condition of the alien. Unless otherwise specifically provided, nothing contained in the 1952 Act shall be construed to *affect any status (or) condition existing* on the effective date of the Act.

The second provision, which reinforces the first, relates to the continued effectiveness of the prior law. As to all such statuses or conditions, *the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.*

Thus, the savings clause demands specific language not merely to "affect" the respondent's status, but also demands a specific provision stating that the prior law is not continued in force and effect.

In view of these linked provisions, the familiar rule of statutory construction requires that the general language which has been used to encompass all of the numerous

classes of aliens described in section 241(a),¹⁵ must succumb, even were there a conflict to the specific provisions of the savings clause.

As this Court declared in *MacEvoy v. United States*, 322 U.S. 102 (1943):

“However inclusive may be the general language of a statute, it ‘will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which might otherwise be controlling.’ *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1931).”

In *National Labor Relations Board v. Jones and Laughlin*, 301 U.S. 1, 30 (1936), this Court stated the same principle:

“(Courts) are not at liberty to deny effect to specific provisions which Congress has the constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. *The cardinal principle of statutory construction is to save and not to destroy.*” (Italics supplied)

The cases which have given detailed analysis to the problem have found the necessary specificity wanting in section 241(d). *U.S. ex rel. DeLuca v. O'Rourke*, 213 F. 2d 759, 764 (C.A. 8, 1954), holds 241(d) not sufficiently specific to disturb nondeportable status obtained through a judicial

¹⁵ The former Commissioner of the Immigration and Naturalization Service has testified that the 1952 Act sets forth over 700 different grounds of deportation and that under the prior laws there were 465 such grounds. *Hearings, Senate Appropriations Committee on Department of Justice Appropriation for 1954*, 83rd Cong., 1st Session, p. 250 (1953).

recommendation against deportation. In *U.S. ex rel. Sciria v. Lehmann*, 136 F. Supp. 458, 462, 463 (N.D. Ohio 1955), the District Judge in the instant case reversed himself. His *Sciria* opinion was relied upon by the Court below (R. 29). The *Sciria* opinion states that section 241(a) and section 241(d) [8 U.S.C. 1251]:

“do not specifically provide for the deportation of aliens who were excludable under the law in effect at the time of entry but who acquired a status of non-deportability thereafter under prior law. . . . In the recent cases of *Ex parte Robles-Rubio*, D.C. 119 F. Supp. 610, and *United States ex rel. De Luca v. O'Rourke*, 8 Cir. 213, F. 2d 759, it was held that judicial recommendations under prior law which were effective to prevent the deportation of aliens convicted of illicit traffic in narcotics, continued to be valid under the savings clause of the 1952 Act notwithstanding the absence of any provision in the Act empowering judges to make recommendations against deportation in such cases. The same principle that governed in *Robles-Rubio* and *De Luca* would seem to be applicable here. The only essential difference between the cited cases and the case of petitioner relates to the manner in which the status of nondeportability was acquired.

In *Lee You Fee v. Dulles*, 133 F. Supp. 160, 236 F. 2d 885 (C.A. 7, 1956), now pending upon an application for certiorari (No. 643), the retroactive provisions of section 310(c) of the 1952 Act (8 U.S.C. 1401(c)) were also held to be wanting as an express exception to the savings clause.

Against the specific and express provisions of the savings clause, petitioner tilts the general, 700 ground-covering phrase in section 241(d) to establish respondent's deportability. In the light of the Congressional policy to

preserve for aliens advantages acquired under prior legislation, and in the light of the use by Congress of such express language as "notwithstanding section 405," we submit that no language short of an equally express statement should be held to overcome the savings clause.

(E) POLICY OF PRESERVATION

"The cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1936). Accord, *United States v. Menasche*, 348 U.S. at 538 (1954).

Congress intended to preserve orders of deportation and pending deportation proceedings under prior legislation. It intended to preserve the thousands of prior law adjustments of status acquired through suspension of deportation, preexamination, registry, and under the Displaced Persons Act [Point II(c)5]. This Court should similarly uphold the Congressional intention to preserve rather than to destroy the statutory *status quo* and the nondeportable status here involved.

(F) GIVING EFFECT TO ALL PARTS OF THE 1952 STATUTE.

It is the Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882).

The Court below properly applied this principle. As it observed, the argument of petitioner would effectively emasculate the savings clause (R. 30). The effect of his argument is that where there is a change in the statute relating to deportation having retroactive effect, the savings clause has no application. It is however, only in such cases that the savings clause is of importance. This precise point is made in the *Shomberg* opinion:

"If the grounds for deportation are the same under the prior law as under the new Act, then nothing in the

new Act *affects* petitioner; it is clear that rights under the savings clause have not been infringed even if there is no specific exemption. Only where something in the new law introduces a change, *thereby affecting one's status under the old law*, is the savings clause called into play. Only then is a specific exception to § 405 required." 348 U.S. at 546 (Italics supplied).

The Court below, therefore, commented quite appropriately (R. 30):

"On the other hand, the conclusion we have reached does no violence to the provisions of section 241(d) of the Act, 8 U.S.C.A. §1251(d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor statutes, among them specifically the 1917 and 1924 Act. The purpose and effect of section 241 (d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241(a)(1), 8 U.S.C.A. §1251(a)(1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924."

Through the retroactive deportation provisions of the 1952 Act aliens deportable under prior laws whose presence here was not detected on December 24, 1952, continued to be deportable despite the repeal of those laws. On the other hand, those who acquired a nondeportable status under

the prior laws had such status preserved. In this way effect can and will be given to all parts of the statute.

(G) STRICT CONSTRUCTION OF DEPORTATION STATUTES.

Respondent is married to an American citizen and is the father of four American children, two of whom are minors. He has been a resident of the United States for more than forty-five years and has led a blameless life for the past fifteen years or more (R. 25).

For him deportation is banishment, and because deportation is such a drastic measure, doubts in statutory construction, if any, are to be resolved in his favor. *Fong Haw Tan v. Phelan*, 333 U.S. 10 (1947). This is an added reason, as found below (R. 31), for reaching the conclusion advanced by respondent.

Conclusion

Before an alien, resident here half his life time, is torn away from his wife and children and deprived of all that makes life worth living, the statutory mandate for his banishment should be clear and unequivocal. There is no such precise and explicit Congressional direction here. On the contrary, every known aid in statutory construction leads to the conclusion that Congress intended to preserve respondent's status of nondeportability. We therefore urge that the decision below be affirmed.

Respectfully submitted,

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APPENDIX A

THE IMMIGRATION AND NATIONALITY ACT

SEC. 405(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [statutes], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired

NATIONALITY ACT OF 1940

SEC. 347(a) Nothing contained in either chapter III or in chapter V of this Act, unless otherwise provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization or of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any act, things, or matter, civil or criminal, done or existing, at the time of this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the statutes repealed by this Act are hereby continued in force and effect.

THE IMMIGRATION AND NA-
TIONALITY ACT

NATIONALITY ACT OF 1940

immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

(b) Any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined within two years thereafter in accordance with the requirement of law in effect when such petition was filed.

APPENDIX B

S. 3455, 81st Congress, 1st Sess.

TITLE III—NATIONALITY AND NATURALIZATION**SAVINGS CLAUSE**

SEC. 361. (a) Nothing contained in this title, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal brought, or any status, condition, act, thing, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, acts, things, or matters, the statutes or parts of statutes repealed by this Act are hereby continued in force and effect.

(b) Except as otherwise specifically provided in this title, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

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JUN 23 1957

JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 72.

JOHN M. LEHMANN,
District Director,
Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* BRUNO CARSON
or BRUNO CARASANITI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

HENRY C. LAVINE,
Williamson Bldg., Cleveland, Ohio,
Attorney for Respondent.

TABLE OF CONTENTS.

PETITION FOR REHEARING	1
Conclusion	20
Certificate of Counsel	21

TABLE OF AUTHORITIES.

Cases.

<i>Fong Haw Tan v. Phelan</i> , 333 U. S. 6	21
<i>U. S. ex rel. Dominic Sciria v. Lehmann</i> , 136 F. Supp. 458	11, 14, 15

Statutes.

Immigration Nationality Act of 1940, Sec. 728(b) ..	
.....	9, 11, 14, 17

Immigration and Nationality Act of 1952:

Sec. 241(a)	2, 5, 6, 9
Sec. 241(a)(1)	2, 6, 18, 20
Sec. 241(a)(4)	2, 5, 6, 7, 18, 20
Sec. 241(d)	1-10, 18-20
Sec. 405(a)	1, 9, 20

8 U. S. C. 115	10
8 U. S. C. 1251(a)(1)	15
8 U. S. C. 1251(d)	15
8 U. S. C. 1254	19
8 U. S. C. 1255	19
8 U. S. C. 1257	19
8 U. S. C. 1258	19
8 U. S. C. 1259	14, 19

ADDENDUM.

In the lower court in this case, the respondent contended that his deportation violated the ex post facto provisions of the Constitution. The Appellate Court held that ex post facto does not apply and cited *Galvan v. Press*, *Marcelló* and *Harisiades* cases. In this Court Justices Black and Douglas agreed with this contention.

In the light of the re-argument granted in No. 34, *Rowolt v. Peretto*, which involves this issue, it is respectfully urged that rehearing be granted herein to consider the same.

Respectfully submitted,

HENRY C. LAVINE,

Attorney for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 72.

JOHN M. LEHMANN,

District Director,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* BRUNO CARSON
or BRUNO CARASANITI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

Now comes the undersigned attorney for the respondent herein and presents this, his petition for a rehearing of the above-entitled cause, and in support thereof respectfully states:

That by an opinion handed down on the 3rd day of June, 1957, this Court reversed the decision of the United States Court of Appeals for the Sixth Circuit, which in turn held that this respondent, the appellant in the lower Court, was not deportable because he came under the benefit of the Savings Clause, Section 405(a) of the Immigration and Nationality Act of 1952, and that Section 241(d) of the said Immigration and Nationality Act was not applicable in the case of this respondent because the exceptions spoken of in that section were not specific so

as to exempt the respondent from the benefits of the Savings Clause.

In reversing the Sixth Circuit, this Court held that Carson does not come within the provisions of the Savings Clause and that Section 241(d) "otherwise specifically provides" for the deportation of aliens and that the Savings Clause also provides "if it is otherwise specifically provided."

"(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens **belonging** to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien **belongs** to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

An analysis shows three provisions for deportation in that section:

1. Any alien who committed offenses enumerated in subsection (a) of 241 is deportable. (Carson would come under (a) (1) and (4).)

2. The fact that the alien entered the United States prior to the date of enactment of this Act or that the acts the alien committed which made him deportable "occurred prior to the date of enactment," does not help the alien, because Congress can legislate retroactively in deportation cases. (Carson would come under that heading.)

3. The third requisite is that this alien *must be* (on the date of the enactment of this law, June, 1952, or on the effective date of this law, December 24th, 1952), "**belonging to any of the classes enumerated in subsection (a)** notwithstanding that any such alien entered the United States prior to the date of enactment of this Act."

or "that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior the date of enactment of this Act." (Emphasis supplied.)

Congress thus provides that all aliens who (still) **BELONG** to the excludable classes on the day of enactment of this new law, shall be deportable regardless of the fact that they entered the U. S. many years before the enactment of the law or that the acts for which they are made deportable have been committed many years before.

To express its intent Congress in 241(d) uses the words "**BELONGING**" and "**BELONGS**" but not "**BELONGED**." Carson, on the day of the enactment of the new law, **DID NOT** belong to any deportable class and was **NOT DEPORTABLE** when the new law came into effect.

Here it should be noted, and we believe this is most important, that Congress in writing Section 241(d) uses the present tense in designating aliens who "belong to any of the classes enumerated in subsection (a)." Here it must also be noted that Carson does not presently and did not belong to any of the classes enumerated in subsection (a) on the day of enactment of the new law. True, he did belong when he entered, but he did not belong in the deportable class after July 1st, 1924, and he did not belong to the other deportable class because he obtained a pardon which was acceptable at that time.

So, when this law was enacted in June and became effective in December of 1952, Congress used the present tense in stating that the facts, by reason of which any such alien **belongs to any of the classes enumerated in subsection (a)**, cannot apply to respondent Carson because he did not belong to any of the classes enumerated inasmuch as his status had changed many years before the

enactment of this new law and if Congress had intended to reach him, it would have stated by reason of which any such alien **belonged** to any of the classes enumerated in subsection (a).

We do not see any other interpretation that can be given to that portion of Section 241(d) than the one we are now explaining because Congress must have intended to protect aliens who may have belonged to that class at one time but did not belong to that class at the time of the enactment or the effective date of this new Act, and in that way intended to protect the rights of an alien who has removed himself from the excludable classes enumerated in the section at the time of the formation or the effective date of this new law. Not being in the classes of excludable aliens, Section 241(d) could not, and in our opinion, does not apply to aliens like Carson.

This to our mind is of the utmost importance in this case because it seems to the undersigned that the opinion of the Supreme Court is based mainly on Section 241(d) because the Court in the last paragraph of the opinion says:

"And Section 241(d) makes Section 241(a)(1) and 241(a)(4) applicable to all aliens covered thereby notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien **belongs** to any of the classes enumerated in subsection (a) occurred prior to the date of enactment of this Act.'" (Emphasis added.)

It seems that one of the requisites to come under Section 241(d) must be a present belonging to any of the classes enumerated in subsection (a) and of course if such be the case the alien could not be helped in any way even if it "occurred prior to the date of enactment of this Act."

But the main thing is, he must now belong (at the enactment of the new law) to the enumerated classes.

Therefore it is safe to say that if any alien came in as a stowaway prior to July 1, 1924 and remained here more than five years and nothing was done by the Government, that the law then construed that he no longer was deportable as a stowaway and could not be prosecuted as a stowaway, and therefore, when the new law was being enacted and it took effect on December 24th, 1952, that man was not a deportable alien because he did **not belong** for many years before to the enumerated classes of aliens mentioned in Sect. 241(a). And when Section 241(d) was enacted and uses the present tense "belongs" which means at the time the new law was enacted to the enumerated classes of excludable aliens, it could not affect this Respondent.

In the same way, Section 241(a) (4) specifically provides for the deportation of an alien who at any time within entry has been convicted for two crimes involving moral turpitude, he would belong to an excludable class enumerated in that statute. However, respondent Carson took steps to remove himself from that class of excludable aliens by obtaining a pardon from the Governor of Ohio and under the law in existence at that time by so doing he no longer belonged to the excludable class of aliens. That being the case, again we say that when this new law was passed and took effect respondent Carson was no longer a member of or belonged to the deportable class of aliens provided in that statute and was therefore not under Section 241(d) which uses the present tense, "*** * * any such alien belongs to any of the classes enumerated * * ***" and therefore was not a person who came under the provision of said Section 241(d) and was not deportable.

We therefore contend that Section 241(d) was drawn to reach those aliens who "belong" who still "belong" to the class of aliens enumerated in Section 241(a) (1) and 241(a) (4) at the passage of this Act but did not intend to reach aliens who *used to belong* at one time or other to that class but removed themselves from such class of aliens or were removed by operation of law.

It must be remembered that Congress repealed the previous deportation laws but *did not repeal the rights granted those aliens who changed their status under prior laws* and did not make illegal all the discretionary relief that had been granted to thousands of aliens under the old laws. The thousands of aliens who obtained such discretionary relief before the passage of the new law and who *now not deportable* are still not deportable because *they did not belong to the enumerated classes* named in Section 241(a) to 241(d) inclusive at the time of the enactment of this new law, the Nationality Act of 1952.

To give an illustration, if Carson had come into the United States as a stowaway on July 2nd, 1924, then he would still belong to the excludable classes enumerated in Section 241(a) without hope of remedying it because the law for which the statute of limitations applied was only in effect for aliens who entered the United States prior to July 1st, 1924. Therefore, whoever entered after July 1st, 1924, was an alien who was **belonging to any of the classes enumerated in subsection (a)** on the day of the enactment of this new Nationality Act of 1952, and Section 241(d) expressly provides for his deportation and as the Supreme Court said: "The statute otherwise specifically provides for the deportation of an alien and takes this alien out of the protection of the savings clause."

Another example, if Carson had not obtained a conditional pardon under the old law prior to the date of

enactment of this new law, then Carson on the date when 241(d) was enacted would be an alien **belonging** to one of the classes enumerated in subsection 241(a)(4) because on that day he would be **belonging** to such a class and he would be "by reason of which any such alien **belongs** to any of the classes enumerated in subsection (a). * * *

So we say that Congress really intended to protect the aliens who had legally obtained discretionary relief and a change of status of their illegal entries and illegally remaining in the United States by placing this qualification that all those aliens who did not obtain a status of non-deportability by the time of the enactment of this law, then such aliens actually are **belonging** to any of the classes enumerated in subsection (a) and were deportable under Section 241(d) because they were **still members** of that forbidden class and the fact that the acts for which they are now being deported were committed years before the enactment of this new law did not help them in the least.

So we have here a situation where Congress legislated retroactively against aliens who were being deported for past criminal offenses and the Supreme Court before this opinion and in this opinion upholds the right of Congress to do so. But Congress made a condition before such aliens can be deported for past misconduct and that condition is that they must *still be* and must *still belong* at the time of the enactment of this Act to the enumerated classes under subsection (a) and only those aliens are deportable who still are members of such classes of excludable aliens. And at the same time Congress, by using the present tense of the word "belong" and "belonging" to such enumerated classes in subsection (a), protects those aliens who may at one time have belonged to those classes but who no longer did or who no longer were members of such classes on the date of the enactment of this new law

because of the relief that they had obtained under the old laws and the legal remedies which they followed to obtain this particular status were protected by Congress in Section 241(d) by the use of the present tense of the word "belong."

Had Congress used the past tense and said instead that all aliens who at any time **belonged** to any of the classes, it would have included Carson and every alien who was ever in the enumerated classes who entered the United States illegally or remained in the United States illegally after commission of offenses and there would be no hope for any of them.

Therefore, by use of the present tense in the provision by Congress that this law shall only apply to aliens who at that time **belong** to any of the classes enumerated in subsection (a), eliminates Carson and aliens in his class who were no longer members of such classes enumerated in subsection (a) at the time of enactment.

As long as this Court held that Section 241(d) is the applicable section and thereby reversed the Appellate Court, then we must recognize that this particular section holds two things: One, that the fact that the grounds for the deportation "occurring prior to the date of the enactment of this Act is of no help to the alien and he is nevertheless deportable"; and secondly, the other provision is that at the time of the enactment of this Act the alien must **belong** to any of the classes enumerated in subsection (a) and before a deportation can be had for a past misconduct both of the requisites of Section 241(d) must be present.

Only in that way can the rights of aliens who legally obtained relief that was provided for them by law; only in that way can aliens be protected from deportations at the present day who were not deportable because of the pro-

vision under the old laws which granted them the relief that they had; only in that way Congress took the steps to protect the thousands upon thousands of aliens and their families who have taken steps and obtained the benefits provided under the law at that time and by doing so had removed themselves as being members of the excludable classes enumerated in Section 241(a) and were no longer belonging to those classes on that day.

It appears to the writer that a rehearing should be granted by this Court in the case of Carson. After all is said and done, did Congress really intend to deprive aliens of the rights they obtained under prior legislation? While this decision of this Court practically ends the debate as to whether Section 241(d) is specific and removes the alien from the benefits of the savings clause in the same Act, it actually does not settle the real question, Was it the intent of Congress to deprive these aliens of benefits gained under prior legislation? It is highly questionable whether Congress had that in mind when it wrote the terms of Section 241(d) because if Congress did have that in mind it is very strange that it did not say something about it but left it to conjecture. It has been contended at all times in this case that the Savings Clause, Section 405(a) must be read in conjunction with Section 241(d) in order to have an all-around understanding of what Congress really omitted. In view of this decision the many thousands of persons who obtained a change of status from illegal residence to legal residence, by registering, by suspensions, in fact all excludable aliens who were eligible and did apply for permanent residence under former section 728-(b) and who are still eligible to apply at the present date for such status under Section 1259 of the Act of 1952, and excludable aliens who have been granted discretionary relief and thousands of conditional pardons in deportation

proceedings under Section 115, Title 8 U. S. C. are now all deportable.

This opinion, if permitted to stand, makes all aliens deportable who were excludable under any law at the time of their entry, regardless of their having attained a non-deportable status in any of the forms and manners that had previously been provided.

As of this date the decision of this Court in this case is so far-reaching that no alien can now adjust his illegal status to a legal status without being in danger of being deported by the Department for no other reason than illegal entry of many years back. For example, an alien illegally entered the United States, let us say, in 1930. After a lapse of say 10 or 15 years he applies for registry, which is a form of relief, and having been a person of good moral character he obtains registry and up until now that man was not deportable on the ground of illegal entry, or any other ground. Perhaps he is married to a native-born citizen of the United States and has three or four children born here, and in his own mind he is quite safe from the Deportation Department of the Immigration Service. He is established in business and has a growing family, perhaps even grandchildren, just like Carson. As we stated above, he believes himself safe from deportation and was considered safe from deportation by all around, including the authorities, but now, in view of this decision, he is no longer safe from deportation. He can be arrested, tried and ordered deported because he is an alien who was a member of an excludable class at the time of his entry into the United States in 1930. And inasmuch as this Court held that there is a specific exception in Section 241(d) and that at the time of his entry he was an alien excludable by law, he therefore is not entitled to the benefits of the Savings Clause and although he has never committed a crime

in his life he is nevertheless deportable and can be banished at any time that the Deportation Department desires to deport him.

Dozens, even hundreds, of examples of similar nature can be given to this Court which will prove that this opinion has made deportable every alien who has entered the United States illegally and even for that reason alone, and that his changing of his status in accordance with Section 728(b) of the former Nationality Act does not help him.

A reading of the opinion compels the realization that this opinion makes deportable every alien even though he never committed a crime in his life, if such alien entered the United States illegally at any time, and even though such alien adjusted his status under the law and was considered as a legal resident for many years heretofore, such alien nevertheless has no standing and can be deported at any time the Department chooses to do so, regardless of his family ties and regardless of the roots that he planted in this country. In this connection it is most interesting to read from the opinion of Judge Charles J. McNamee which was given in the deportation case involving Dominic Sciria and which is reported at 136 F. Supp. 458. This case is now pending in the United States Court of Appeals for the Sixth Circuit awaiting the final decision of the United States Supreme Court in this Carson case. This is the same District Judge who decided the Carson case and later reversed decision on the question of stowaway in Carson. This reversal of opinion is in the case of *Sciria* from which we quote as follows (This part was not published but was submitted to the Sixth Circuit and is mentioned in their opinion.) The District Judge said as follows:

"I am aware that the decision reached in the above entitled case is in conflict with the ruling of this court in *U. S. ex rel. Bruno Carasaniti v. Kershner*, Civil Action No. 30800 in this court (now pending in the Court of Appeals) insofar as Carasaniti's deportation was sustained on the ground that he entered this country as a stowaway in 1918. As indicated above, I am of the opinion that in sustaining Carasaniti's deportation on that ground I was in error. However, it should be noted that in his presentation of the case before me, Carisanti did not rely upon or even refer to the savings clause of the 1952 Act. His sole defense was that the 1952 Act was an *ex post facto* law that operated retroactively to deprive him of vested rights. There was, of course, no merit to this claim. There is another ground upon which the deportation of Carasaniti was sustained. That ground is not involved in this case and I make no comment on the ruling made in connection therewith in Carasanti."

We quote from Judge McNamee's opinion:

"While Sections 1251(a) (1) and 1251(d) expressly provide for the deportation of any alien who was excludable by the law in effect at the time of entry, even though such entry occurred before June 27, 1952, these sections do not specifically provide for the deportation of aliens who were excludable under the law in effect at the time of entry but who acquired a status of non-deportability thereafter under prior law. Nor is there any specific provision for the deportation of aliens who illegally entered this country as members of an excluded class prior to July 1, 1924. If Section 1251(a) (1) be given the effect claimed for it by the Government, then 'any alien' within the classes designated by that section would include— (a) excluded aliens who were eligible to apply for permanent residence under former Section 728(b) and who are still eligible to apply for such status under Section 1259 of the Act of 1952, and (b) excludable aliens who have been granted discretionary

relief in deportation proceedings under former Section 155 Title 8 U. S. C. The construction for which the Government contends would also produce an anomaly in the case of aliens who had been admitted to permanent residence in the United States under former Section 728(b). While such aliens would be deemed to have been lawfully admitted into this country as of the time of their entry, they would nevertheless be aliens who, within the terms of Section 1251(a) (1) were excludable at the time of entry by the law then in effect. It is unreasonable to suppose that Congress would reverse its long-standing policy towards excludable aliens who entered this country prior to July 1, 1924 otherwise than by a plain and specific declaration of its purpose to do so. Section 1251(a) (1) cannot be construed as expressing such intention. That section is applicable generally to all aliens within the classes therein defined. *But it contains no specific provision at variance with the express terms of the savings clause.* The savings clause provides that any statute or part of statute repealed by the 1952 Act shall continue in force and effect as to any 'status' or 'condition' existing at the time the 1952 Act became effective, except as otherwise specifically provided therein. *As I read Section 1251(a) (1) it does not specifically provide that the status of non-deportability acquired by aliens who entered the United States prior to 1924 shall be terminated. In the absence of such a specific provision in the 1952 Act, the savings clause is applicable and preserves to the petitioner his status of non-deportability.* (Emphasis supplied.)

It is not believed that Congress had in mind the wholesale deportations of all aliens, whether they adjusted their status or not. But it cannot be denied that the opinion leaves no other alternative.

The important question is, if Congress did intend to cause the deportation of all aliens, without exception, who

entered illegally or who became deportable after entry for other reasons, why did it insert Section 1259 of Title 8 U. S. C. in the new Act, which reads as follows:

"1259. Record of admission for permanent residence in the case of certain aliens who entered the United States prior to July 1, 1924.—(a) A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, if no such record is otherwise available and such alien shall satisfy the Attorney General that he—

- (1) entered the United States prior to July 1, 1924;
- (2) has had his residence in the United States continuously since such entry;
- (3) is a person of good moral character;
- (4) is not subject to deportation; and
- (5) is not ineligible to citizenship.

(b) An alien in respect of whom a record of admission has been made as authorized by subsection (a), shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of his entry prior to July 1, 1924. (June 27, 1952, c. 477, Title II; subchap. 5, Sec. 249, 66 Stat. 219.)

• It should be remembered that this section 1259 of the Nationality Act of 1952 is a reenactment in that Act of the old section 728(b) of the former Nationality Act which was repealed by the Act of 1952 and while there are just a few slight changes in phraseology and arrangement of the text in the new section in scope and effect it is identical with former section 728(b).

To quote Judge McNamee in the *Sciria* case, "It would seem therefore, that Congress has adhered consistently to a policy of permitting aliens who unlawfully entered the

United States prior to July 1st, 1924, to apply for a status of permanent residence in this country."

The Government contended in its argument and brief that the petitioner was divested of his status of non-deportability under prior law by the repeal of the 1917 Act and by the provisions of Section 1251(a)(1) and 1251(d) of the Act of 1952. This contention was made by the Government in the District Court, in the Appellate Court and in the Supreme Court in the Carson case, as well as in the Sciria case, and Judge McNamee answered that contention that was made before him in the Sciria case as follows:

"(1) It is no longer open to question that Congress in the exercise of its plenary power over aliens may enact legislation retroactive in its effect and provide for the expulsion of aliens on grounds that were non-existent at the time of their entry and remove existing bars to deportation. *Carlson v. Landon*, 342 U. S. 524, 72 S. Ct. 525, 96 L. Ed. 547; *Harrisiades v. Shaughnessy*, 342 U. S. 580, 72 S. Ct. 512, 96 L. Ed. 586; *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U. S. 521, 70 S. Ct. 329, 94 L. Ed. 307; *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549; *Marcello v. Ahrens*, 5 Cir., 212 F. 2d 830.

"(2) The only question that arises in this connection is whether by the terms of the pertinent provisions of the 1952 Act, Congress expressed its intention to deport aliens who had acquired a status of non-deportability under prior law.

"Section 1251(a)(1) of the Act of 1952 provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry; * * *

"Section 1251(d) provides in part as follows:

“(d). Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27, 1952. * * *’

“The foregoing sections of the 1952 Act must be read together with the savings clause, which in pertinent part provides:

“‘Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect * * * any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (should probably read *statuses*), *conditions*, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.’ 8 U. S. C. A. Sec. 1101 note.” (Emphasis supplied.)

The District Judge continues in his opinion to point out that these (above) sections do not specifically provide for the deportation of aliens who were excludable under the law in effect at the time of entry but who acquired a status of non-deportability thereafter under prior law.

The Judge in his opinion further says:

“* * * If section 1251(a) (1) be given the effect claimed for it by the Government, then ‘any alien’ within the classes designated by that section would include—(a) excludable aliens who are eligible to apply for permanent residence under former Section 728(b) and who are still eligible to apply for such status under Section 1259 of the Act of 1952, and (b)

excludable aliens who have been granted discretionary relief in deportation proceedings under former Section 155 Title 8 U. S. C. A. The construction for which the Government contends would also produce an anomaly in the case of aliens who had been admitted to permanent residence in the United States under former Section 728(b). *While such aliens would be deemed to have been lawfully admitted into this country as of the time of their entry, they would nevertheless be aliens who, within the terms of Section 1251(a)(1) were excludable at the time of entry by the law then in effect.*" (Emphasis supplied.)

We believe Congress could not have intended in the new law, the Nationality Act of 1952, to deport all aliens who illegally entered the United States and belonged to excludable classes during a period prior to July 1st, 1924. It seems more reasonable to believe that when Congress passed the old laws with the statute of limitations and provisions for registry and for suspension of deportation, pardons, and other relief measures, that Congress felt then that these aliens should be given the right to attain a nondeportable status, and these relief measures are still included in the new law.

As this Court knows, thousands of aliens within the classes designated by that Section 241 includes excludable aliens who entered as stowaways, or in other illegal manner, who would have been deported if they had not obtained discretionary relief under Section 728(b) of the law of 1940. Also aliens who were convicted of two felonies involving moral turpitude, who would have been deported if they had not obtained a pardon, conditional or full, or suspension of deportation. These aliens were all members of the excludable classes of aliens upon entry or became deportable after entry. Having obtained the various forms of relief provided for in the old law—Sec-

tion 155, Title 8—they of course were not deportable on the date of enactment of the new law of 1952.

Therefore, Congress to protect these thousands, in writing the new deportation law, especially Section 241(d), took steps to protect them by providing that only those aliens who on the date of enactment (still) **belong** or are **belonging** to those excludable classes of aliens enumerated in 241(a) (1) and (a) (4) shall be deported.

That, of course, means that all those aliens who may have at one time **belonged** to the excludable classes in 241, but who took steps either by pardons, obtaining suspension, discretionary relief or other means, or became non-deportable by reason of a statute of limitations did therefore, **not belong** and were **not belonging** to the excludable classes of aliens in 241, on the day when the new Act of 1952 was enacted or took effect.

Carson did not belong to the excludable class on the date of the enactment of the new law and that fact being a requisite for deportation under 241(d) he was not deportable under any law.

While Congress provided deportation of aliens for *past* offenses, no matter when committed, and provided deportation for illegal entry *no matter when same occurred*, it checkmated wholesale deportations of aliens by providing a condition of *present membership* of such aliens to the excludable classes enumerated in Section 241.

After all is said and done, would it not be most unreasonable to believe that Congress deliberately made *every* alien deportable whoever entered the United States illegally at any time before or after the enactment of the Act of 1952, regardless of the legal steps taken by the alien in accordance with the provisions of the old laws, passed by Congress, and despite this alien's attainment of a status of nondeportability under the law prior to the passage of the Act of 1952?

One wonders if Congress intended, in the Act of 1952, to deprive the aliens of all the benefits and the relief granted them under the *old laws*, and make them all deportable for illegal entries even prior to July 1st, 1924, when they were not deportable by operation of law.

If Congress really intended to do so, then why did they put into the new law the very same kind of provision for the relief of aliens who entered illegally or became deportable after entry such as Section 1254—suspension of deportation—voluntary departure with or without pre-examination; adjustment of status—Section 1255—also Sections 1257, 1258—change of status—Section 1259—registry for permanent residence of aliens who were members of the excludable class of aliens. All of these provisions are put in the new law to make these aliens non-deportable.

It is not reasonable to believe that the same Congress who deprived the aliens who applied for and attained a non-deportable status under the old laws and make them deportable would now put into the new law practically the very same provisions for their relief from deportation that it took away from them under the old law.

We believe Congress, in Section 241(d), took the steps necessary to protect all those aliens who:

entered illegally or as stowaways prior to July 1, 1924 (Law of 1917, Statute of Limitations);

entered legally but remained longer than permitted (By adjustment of status, 155, 8 U. S. C.);

convicted for commission of two felonies involving moral turpitude (Conditional pardon, Law of 1917-1924);

illegal entry as stowaway or crew member (Registry for permanent residence for lawful admission);

all deportable aliens who received suspension of deportation;

all deportable aliens who presented conditional pardons;
 all excludable aliens who were granted voluntary departure and returned on the visa of a citizen spouse.

Those aliens were no longer members of the excludable classes enumerated in subsection (a) (1) and (a) (4) and therefore, Congress took steps to protect them.

CONCLUSION.

Sections 241(a)(1) and (4) provide for the deportation of aliens who entered the U. S. and belonged to one or more of the classes of aliens excludable by the law existing at the time of such entry and also makes deportable aliens convicted of two crimes. Carson comes under that heading *but would be entitled to the protection of the Savings Clause 405(a)* unless this Court has finally decided that 241(d) is a specific exception to the Savings Clause.

Therefore the Sections 241(a)(1) and (4) must be read in conjunction with 241(d) and this Court should construe *literally* the wording in 241(d) and there the Court will find that that section provides for the deportation of an alien who belonged to excludable classes on the date of entry or were deportable for crimes, *only* if this alien was "**belonging**" or "**belongs**" to the same excludable and deportable class on the date of the enactment of Section 241(d).

In view of the clear intent of Congress expressed by the use of the present tense of "**belong**" in Section 241(d) it is believed that this case affecting many thousands of families ought to be reconsidered for the views stated herein and a rehearing ought to be granted. Additional

support for our cause is found in *Fong Haw Tan v. Phelan*,
333 U. S. 6-10.

The Respondent prays this Honorable Court grant a
Rehearing in this case.

Respectfully submitted,

HENRY C. LAVINE,

Attorney for Respondent.

CERTIFICATE.

The undersigned counsel for Respondent certifies that
this Petition for Rehearing is presented in good faith and
not for purposes of delay.

HENRY C. LAVINE.